A

TREATISE

ON THE LAW OF

INSURANCE,

IN FOUR BOOKS;

I. OF MARINE INSURANCE,
II. OF BOTTOMRY AND RESPONDENTIA,
III. OF INSURANCE UPON LIVES,
IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

THE SECOND EDITION,
WITH CORRECTIONS AND ADDITIONS.

IN TWO VOLUMES.
VOL. II.

Laudo mercatorem, qui fidem, etiam contra leges datam, servat; sed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et rescindit pactiones quas lex rescindi jubet. Judicis est leges sequi; nec disputare an turpiter faciat assecurator, qui fidem datam violat.—Esto, turpiter faciat; sed, et turpiter facit qui contra leges pacisitur.

Bynk. Quæst. jur. priv. lib. 4. c 5.

LONDON:

PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, LAW BOOKSELLER, FLEET-STREET,
AND J. COOKE, ORMOND QUAY, DUBLIN.

1808.

NAMES OF THE CASES CITED.

Thoſe in *Italics* are cited from Manuſcript Notes.

Where a Caſe refers to ſeveral Pages, the firſt is generally that in which it is cited moſt at large.

	Page.
African Company *v.* Bull	149
Aguilar *v.* Rodgers	673
Airy v. *Bland*	294
Allen *v.* Hearne	119
Allwood *v.* Henkle	593
Amery *v.* Rodgers	619, 709
Anderſon *v.* Edie	776
Anderſon *v.* Pitcher	373
Anderſon *v.* Ro. Ex. Aſſur.	594
Andrée *v.* Fletcher	144, 643
Angerſtein *v.* Bell	262
Anonimous from Skin.	265
Anonimous from 2 Vern.	61
Anthon *v.* Fiſher	504
Aſſievedo *v.* Cambridge	124, 125, 501
Atherfold *v.* Beard	119
Atty *v.* Lindo	220
Aubert *v.* Maze	51
Audley *v.* Duff	669, 367
Abel, M'Carthy *v.*	606
Abel, Morck *v.*	647, 74
Aguilar, Geyer *v.*	391, 404
Allen, Dick *v.*	622
Allen, Long v.	660
Anderſon, Camden *v.*	65, 181, 712
Anderſon, Camden *v.* (2d caſe)	115
Anderſon, Minnett *v.*	265
Anderſon, Parr *v.*	196
Angerſtein, Charaud *v.*	469
Angerſtein, Tidſwell *v.*	778
Appleton, Bird *v.*	262, 415, 419
Atty, Dawſon *v.*	452
Baillie v. *Modigliani*	728
Barber *v.* Fletcher	454
Barclay *v.* Couſins	99, 138
Baring *v.* Chriſtie	430
Baring *v.* Clugget	428
Baring *v.* Day	548
Baring *v.* Roy. Ex. Aſſur.	433
Baring *v.* Henkle	140
Barker *v.* Blakes	836
Barras *v.* Lond. Aſſur.	266
Burton *v.* Wolliford	753
Barzillay v *Lewis*	398, 411, 417
Bates *v.* Grabham	344, 706
Bean *v.* Stupart	350
Beatſon *v.* Haworth	189, 325
Beckwith *v.* Sydebotham	832
Bell *v.* Gilſon	86, 34, 312
Bendyr *v.* Oyle	27
Bent v. Baker	704, 301
Berens *v.* Rucker	502
Bermon *v.* Woodbridge	662, 78-

	Page.
Bernard *v.* Bridgman -	- 740
Bernardi *v.* Motteux	395, 401, 417, 426
Betſey (Kruger) *Caſe of the*	- 391
Biggs *v.* Lawrence -	- 647
Bird *v.* Appleton	74, 262, 415, 419
Birkley *v.* Preſgrave -	542, 545
Bize *v.* Fletcher -	459, 350
Blackhurſt *v.* Cockell -	- 351
Blankley *v.* Winſtanley	- 532
Boehm *v.* Bell -	644, 109
Bolton *v.* Gladſtone -	- 434
Bond *v.* Gonſales -	- 210
Bond *v.* Nutt -	353, 210, 349
Booth *v.* Hodgſon -	- 50
Bowring *v.* Elmſlie -	228, 233
Boyfield *v.* Brown	587, 227, 619
Brandon *v.* Curling -	- 40
Brandon *v.* Neſbitt	38, 86, 697
Brewſter *v.* Kitchell	40
Briſtow *v.* Towers	39, 34, 86, 697
Brough *v.* Whitmore	723, 270, 319
Brown *v.* Newnham -	- 701
Buller *v.* Fiſher -	- 493
Burnett *v.* Kenſington	234, 225, 228, 232, 486
Buſh *v.* Fearon -	- 735

Backhouſe, French *v.*	- 297
Badcock, Sadler's Company *v.*	804 800
Baker, Bent *v.*	704, 301
Bald, Caldwell *v.*	- 107
Bance, Whitehead *v.*	- 499
Banks, Eraſmus *v.* -	- 138
Banks, Pattiſon *v.* -	- 732
Barnard, Wright *v.*	- 159
Barnevelt, Pawſon *v.*	- 349
Barrell, Dick *v.* -	- 168
Beach, Lee *v.* -	- 160
Beard, Atherfold *v.*	- 119
Bell, Angerſtein *v.* -	- 262
Bell, Boehm *v.* -	644, 109
Bell, Chalmers *v.*	- 64
Bell, M'Andrews *v.*	469, 709
Bell, Pollard *v.* -	413, 420
Bell, Potts *v.* -	87, 696
Bell, Price *v.* -	- 420
Bell, Raine *v* -	- 835
Bendylack, Tabbs *v.* -	- 386
Bernett, Tomkins *v.*	- 490
Berthon, Kenyon *v.* -	- 350
Bettingham, Ricord *v.*	39, 504
Bewick, De Guino *v.*	- 365
Bewick, Oldman *v.*	809, 350, 7[illegible]
Bewick, Thelluſſon *v.*	- 62[illegible]
Bird, Kent *v.* -	- 133
Black, Fox *v.* -	- 186
Black, Glover *v.*	317, 118, 710
Black, Pattiſon *v.* -	- 781
Blackburne, Cornu *v.*	- 504
Blackiſton, Hodgſon *v.*	- 600
Blakes, Barker *v.* -	- 836
Blakes, Middlewood *v.*	328, 203
Bland, Airy v. -	- 294
Boehm, Carter *v.*	479, 90, 465, 648 707
Boehm, Ruſſel *v.* -	- 709
Boldero, Godſall *v.* -	- 777
Bolton, Dobſon *v.* -	- 239
Bolton, Long *v.* -	382, 474
Bovil, Calvert *v.* -	- 402
Bovil, Driſcol *v.*	211, 191, 276
Bovil, Oddy *v.* -	- 391
Bourdieu, Campbell *v.*	- 210
Bourdieu, Journu *v.* -	- 223
Bourdieu, Lowry *v.*	640, 642, 649
Bourdieu, Nutt *v.*	- 526, 534
Bourdellion, Scott *v.* -	- 831
Boydell, Simon *v.* -	- 671
Boydell, Woolridge *v.*	- 324, 184
Bradley, Furneaux *v.*	- 584, 486
Bradſhaw, Roſs *v.* -	- 770
Bridge, Lyons *v.* -	- 707
Bridge, Syers *v.* -	197, 322
Bridgeman, Bernard *v.*	- 740
Brogden, Elton *v.* -	520, 212
Brook, Watts *v.* -	- 52
Brown, Boyfield *v.*	587, 227, 619
Brown, Green *v.* -	- 489
Brown, Stamma *v.* -	- 524
Bruce, Hyde v. -	- 347
Brutton, Fillis *v.* -	467, 453
Buggin, Hartley v. -	200, 185

	Page.
Kennoway, Noble *v.*	258, 19, 270
Kenſington, Burnett *v.*	234, 225, 228, 232, 486
Kenſington, Garrells *v.*	436
Kent, Joy *v.*	739
King, Cary *v.*	692, 720, 552
King, Pond *v.*	497
Kirwan, France *v.*	369
Knightley, Kaines *v.*	706, 345
Kitchell, Brewſter *v.*	40
La Cauſſade *v.* White	646
Langdale v. *Maſon*	791
Lateward *v.* Curling	539
Lavabre *v.* Watſon	192
Lavabre *v.* Wilſon	192, 209, 185, 205, 275
Law *v.* Hollingworth	165, 413
Lawrence *v.* Sidebotham	199, 211
Leatham *v.* Terry	606
Lecras v. *Hughes*	108, 112, 138, 631
Lee *v.* Beach	160
Lees *v.* Smith	53
Leigh *v.* Mather	266, 258
Le Meſurier *v.* Vaughan	314
Le Pypre *v.* Farr	124, 135, 289
Lethulier's caſe	362, 375
Lever *v.* Fletcher	61
Lewin *v.* Suaſſo	528
Lewis *v.* Rucker	624, 288, 710
Lilly *v.* Ewer	364
Littledale *v.* Kenyon	470
Liveſay *v.* Ryder	732
Lockyer *v.* Offley	263, 533, 780
Long v. *Allen*	660
Long *v.* Bolton	382, 474
Long *v.* Duff	382
Loraine *v.* Tomlinſon	668
Lothian *v.* Henderſon	430, 385, 393 413, 428
Lowry *v.* Bordieu	640, 642, 646, 649
Lubbock *v.* Potts	43, 41, 64, 648
Lubbock *v.* Rowcroft	220, 587
Lucena *v.* Craufurd	113, 685
Lynch *v.* Dalzell	801
Lyons *v.* Bridge	707
Laſcelles, Smith *v.*	105, 297
Latham, Terry *v.*	606
Lawrence, Biggs *v.*	647
Lee, Penſon *v.*	655 694
Leeds (Duke of), Pugh *v.*	782
Legendra, Jeffrey *v.*	378
Legg, Farmer *v.*	178, 413
Le Meſurier, Flint *v.*	107, 138
Le Meſurier, Gamba *v.*	41
Le Meſurier, Kellner *v.*	675, 41, 114
Lewis, Barzillay v.	398, 411, 417
Lindo, Atty *v.*	220
Liotard, Cox. *v.*	732, 783
Lond. Aſſur. Barraſs *v.*	265
Lond. Aſſur. Cantillon *v.*	223, 230, 233, 235
Lond. Aſſur. De Ghetoff *v.*	679
Lond. Aſſur. Drinkwater *v.*	790, 792
Lond. Aſſur. Godin *v.*	105, 150
Lond. Aſſur. Motteux *v.*	207, 262, 344
Lond. Aſſur. Rucker *v.*	253
Ludlow, De Paiba *v.*	125, 123, 497
Luſhington, Neſbitt *v.*	230, 508, 233, 687, 717
Maans *v.* Henderſon	302
M'Andrews *v.* Bell	469, 709
M'Andrews *v.* Vaughan	232
M'Carthy *v.* Abel	606
Macdowell *v.* Fraſer	456
Mace *v.* Cadell	732
M'Maſters *v.* Shoolbred	581
Manning v. *Gift*	367
Manning v. *Newnham*	585
Maria (*caſe of the*)	444
Marriott *v.* Hampton	732
Marſdon *v.* Reid	325, 190, 455
Marſh *v.* Robinſon	712, 117, 687
Marſham *v.* Dutrey	542
Martin *v.* Sitwell	123
Maſon v. *Sainſbury*	794
Maſon *v.* Scurray	226, 223, 588
Mathie *v.* Potts	689
Mayne v. *Walter*	397, 405, 418, 478
Menetony *v.* Dunlop	264
Meyer v. *Greigson*	658, 667, 676

Page.

Middlewood *v.* Blakes 328, 203
Miller *v.* Fletcher 578, 171, 562, 615
Mills *v.* Roebuck - 161
Minnett *v.* Anderſon - 265
Mitchell *v.* Cockburn - 48
Mitchell *v.* Edie 590, 614
Molliſon *v.* Staples - 121
Montgomery *v.* Egginton 278, 92
Morck *v.* Abel - 647, 74
Morſe *v.* Sluc - 242
Moſes *v.* Macfarlane 732
Moſs *v.* Byrom 283, 521
Motteux *v.* Lond. Aſſur. 207, 262, 344
Mouſe's caſe - 535
Murdock *v.* Potts - 326

M'Carthy, Rogers *v.* - 341
Macfarlane, Moſes *v.* - 732
Machell, Gale *v.* - 659
Mackenzie, Jenkins *v.* - 584
M'Vicar, Sellar *v.* 323, 280, 281
Malcolm, Hodgſon *v.* 490, 687
Margetſon, Henrickſon *v.* 101, 169
Marryat, Wilſon *v.* 68, 387, 183
Maſon, Giſt *v.* 84, 89, 34
Maſon, Langdale v. - 791
Mather, Fitzherbert *v.* 457, 300
Mather, Leigh *v.* - 266, 258
Maylor, Rodgers *v.* 634, 636, 682
Maynard, Harford *v.* - 24
Maze, Aubert *v.* - 51
Mendes, Hamilton *v.* 572, 514, 580, 584
Millar, Harriſon *v.* 52, 54
Milligan, Peters *v.* - 544
Modigliani, Baillie v. - 728
Modigliani, Denniſon *v.* 281, 284
Modigliani, Way *v.* - 326
Molineux, Hall *v.* - 313
Morley, Gordon *v.* 363, 210
Motteux, Bernardi *v.* 395, 401, 417, 426
Motteux, Delmada *v.* - 82
Moy, Came *v.* - 27
Muilman, Woolmer *v.* - 435

Page.

Nantes *v.* Thompſon 686, 41, 114
Nayade, (*caſe of the*) - 523
Neal *v.* Irving - 708
Neſbitt *v.* Luſhington 230, 508, 233 689, 717
Neſbitt *v.* Whitmore - 655
Newby *v.* Read - 146, 489
Newman *v.* Cazalet - 763
Noble *v.* Kennoway 258, 19, 270
Norvill *v.* St. Barbe - 837
Nutt *v.* Bourdieu - 526, 534

Natally, Strong *v.* - 256
Neſbitt, Brandon *v.* 38, 86, 697
Newnham, Brown *v.* - 701
Newnham, De Coſta *v.* - 598
Newnham, Manning v. - 585
Nutt, Bond *v.* 353, 210, 349
Nutt, Schoolbred v. - 475, 154

Oddy *v.* Bovill - 391
Odin, (*caſe of the*) - 523
Oldman *v.* Berwick 809, 350, 790
Oliver *v.* Cowley - 160
Oyen Flad (*caſe of the*) - 389

Offley, Hinchman v. 173, 185
Offley, Locker *v.* 263, 533, 780
Oyle, Bendyr *v.* - 27

Page *v.* Fry - 684
Page *v.* Rogers - 731
Parker *v.* Carter - 293
Parkinſon *v.* Collier 257
Parr *v.* Anderſon - 196
Patterſon *v.* Black - 781
Pattiſon *v.* Banks - 732
Pawſon *v.* Barnevelt 349
Pawſon *v.* Watſon 458, 349, 451, 454
Pelly *v.* Roy. Ex. Aſſur. 269, 168, 205
Penſon *v.* Lee - 655, 694
Perchard *v.* Whitmore 683
Peters *v.* Milligan 544
Phyn *v.* Roy. Ex. Aſſur. 519
Planché *v.* Fletcher 461, 327, 34, 60

	Page.
Plantamour v. *Staples*	169, 102, 171, 581
Pollard *v.* Bell	413, 420
Pond *v.* King	497
Potts *v.* Bell	87, 646
Praye *v.* Edie	307
Price *v.* Bell	420
Pringle *v.* Hartley	566, 569
Pugh *v.* Duke of Leeds	782
Parker, Rich *v.*	409
Parkinſon, Eden *v.*	387
Parkinſon, Grant v.	97, 107, 138
Parr, Rhol *v.*	492, 620, 687
Parry, Cox *v.*	307
Paſſmore, Driſcol *v.*	276, 211
Patten, Hill *v.*	342
Paxton, Grant v.	260, 274, 323
Penaluna, Clugas *v.*	647
Pickerſgill, Hoſkins v.	727
Pigou, Hibbert v.	369
Pitcher, Anderſon *v.*	373
Pole, Fitzgerald *v.*	584, 486
Poole, Eden *v.*	721
Poole, Fletcher *v.*	721
Poole, Willis *v.*	771
Porter, Senat *v.*	716
Potts, Lubbock *v.*	43, 41, 64, 648
Potts, Matthie *v.*	689
Potts, Murdock *v.*	326
Potts, Sheriff *v.*	188, 275, 634
Preſcoti, Viſger *v.*	830
Preſgrave, Birkley *v.*	542, 545
Prinſep, Hunter *v.*	316
Proudfoot, Delbye *v.*	27
Raine *v.* Bell	835
Randall *v.* Cockran	611
Ratcliffe v. *Shoolbred*	468, 465
Rhol *v.* Parr	492, 620, 687
Rich *v.* Parker	409
Ricord *v.* Bettenham	39, 504
Ridout *v.* Johnſon	704
Riſing v. *Burnett*	730, 682
Roberts *v.* Fonnereau	453
Roberts *v.* Trenayne	749
Robertſon *v.* Ewer	721, 513
Robertſon *v.* French	323, 261, 711
Robſon v. *Wilſon*	294
Rodgers *v.* Maylor	634, 636, 682
Roebuck *v.* Hammerton	119, 775
Rogers *v.* Davis	147
Rogers *v.* M'Carthy	341
Roſs *v.* Bradſhaw	770
Roſs *v.* Hunter	531, 727, 717
Roſs *v.* Thwaites	319
Roteh *v.* Edie	44, 511, 722
Rothwell *v.* Cooke	657
Routledge *v.* Burrell	810, 350, 769, 790
Rucker *v.* Hollingbury	651
Rucker *v.* Lond. Aſſ.	253
Ruſſel *v.* Beehin	709
Randall, Jones *v*	119
Read, Newby *v.*	146, 489
Reallon, Wilton *v.*	307
Redſhaw, Guibert *v.*	208
Redſhaw, Smith *v.*	361
Reed, Weymell *v.*	647
Reid, Marſden *v.*	325, 190, 455
Rimmington, Gordon *v.*	720
Richardſon, Hodgſon *v.*	322, 702
Roberts, Covington v.	543
Robinſon, Hadkinſon *v.*	218, 587
Robinſon, Marſh *v.* 712	117, 687
Rockwood, Havilock *v.*	596, 713
Rodgers, Aguilar *v.*	673
Rodgers, Amery *v.*	619, 709
Rodgers, Furtado *v.*	40
Rodgers, Heywood *v.*	476, 154
Roebuck, Mills *v.*	161
Rogers, Page *v.*	731
Rolleſton, Hibbert *v.*	117
Rowcroft, Dyſon *v.*	238, 228, 486
Rowcroft, Earle *v.*	522
Rowcroft, Lubbock *v.*	220, 587
Rowcroft, Thomſon *v.*	609, 100
Rucker, Berens *v*	502
Rucker, Lewis *v.*	684, 288, 710
Roy. Ex. Aſſur. Anderſon *v.*	594
Roy. Ex. Aſſur. Baring *v.*	433
Roy. Ex. Aſſur. Carter *v.*	202
Roy. Ex. Aſſur. Henkle *v.*	343, 34

	Page.
Roy. Ex. Aſſur. Hurry v.	254
Roy. Ex. Aſſur. Hurry v. 2d caſe	631
Roy. Ex. Aſſur. Pelly v. 269,	168, 205
Roy. Ex. Aſſur. Phyn *v.*	519
Ryan, Kewley *v.* 174, 172,	184, 327
Ryder, Liveſay *v.* -	732
Sadler's Company *v.* Badcock	804, 800
Saint Juan Baptiſta (*caſe of the*)	449
Saloucci v. *Johnſon* 387, 405,	435, 437, 508
Saloucci v. *Woodmaſs* -	401
Salvador *v.* Hopkins -	271
——— *v.* Sands -	501
Salwin *v.* James -	799
Santa Cruz (*caſe of the*)	553
Sarah Chriſtina, (*caſe of the*)	80
Scott *v.* Bourdillion -	831
Scott *v.* Thompſon -	204
Seamon *v.* Fonnereau 472,	467
Seller *v.* M'Vicar - 323,	280
Seller v. *Work* -	299
Senat *v.* Porter -	716
Sharp *v.* Gladſtone -	607
Sharpley *v.* Hurrel -	749
Shawe *v.* Felton -	139
Sheriff *v.* Potts 188, 275,	634
Shirley *v.* Wilkinſon -	471
Skoolbred v. *Nutt* 475,	154
Simond *v.* Boydell -	671
Smith *v.* Cologan	301
Smith *v.* Laſcelles 105,	297
Smith *v.* Redſhaw	61
Smith *v.* Surridge 200, 390,	713
Soome *v.* Gleen -	749
Sparrow *v.* Carruthers -	252
Spencer *v.* Franco -	514
Stackpool *v.* Simon -	772
Stamma *v.* Brown -	524
Stevenſon *v.* Snow - 655,	377
Stewart *v.* Dunlop - 468,	300
Stitt *v.* Wardell 188, 208,	275
Stott *v.* Vaughan 184, 202,	327
Story *v.* Natally -	256
Suiſter *v.* Coel -	28
Sullivan *v.* Greaves -	49
Sumner *v.* Green -	745
Syers *v.* Bridge - 197,	322
Sainſbury, Maſon v. -	794
St. Barbe, Cazalet *v.* - 583,	486
St. Barbe, Norvill *v.* - -	837
Sands ——— *v.* -	501
Scandaret, Da Coſta *v.* 472,	650
Schmoll, Jones *v.* - 717,	555
Scott, Frogmorton *v.* -	136
Scurray, Maſon *v.* 223, 226,	588
Secretan, Chriſtie *v.* 41 177,	424
Secretan, Hill *v.*	114
Selwyn, Chitty *v.* - 262,	679
Sheddon, Johnſon *v.* -	629
Sheddon, Thelluſon *v.* -	832
Shoolbred, M'Maſters *v.*	581
Shoolbred, Ratcliffe v. 468,	465
Sidebotham, Lawrence *v.* 199,	211
Simmonds, Claſon *v.* -	190
Simon, Stackpool *v.* -	772
Sitwell, Martin *v.* -	123
Skurray, Maſon *v.* 226, 223,	588
Slue, Morſe *v.* - -	242
Smith, Lees *v.* -	53
Smith, Wilſon *v.* 224, 232,	234
Snow, Stevenſon *v.* - 377,	655
Staniforth, Tarleton -	797
Staples, Molliſon *v.* -	121
Staples, Plantamour v 169, 102,	171, 581
Staples, Thelluſſon *v.* 358,	355
Steadman, Williams *v.*	757
Stevens, De Friſe *v.*	521
Stoddart, Delany *v.*	205
Stupart, Bean *v.*	350
Suart, Horncaſtle *v.*	279
Suaſſo, Lewin *v.*	528
Surridge, Smith v. 200, 390,	713
Sutton, Johnſon *v.*	83
Swanſon, De Vignier *v.* -	311
Sweeting, Goram *v.* -	695
Sydebotham, Beckwith *v.*	832

Tabbs

	Page.
Tabbs *v.* Bendelack -	386
Tarleton *v.* Staniforth -	797
Tatham *v.* Hodgſon 487, 491, 555, 687, 717	
Taylor *v.* Woodneſs -	376
Thelluſſon *v.* Bewicke -	622
Thelluſſon *v.* Ferguſſon	355, 359
Thelluſſon *v.* Fletcher	129, 599, 637
Thelluſſon *v.* Sheddon	832
Thelluſſon *v.* Staples	358, 355
Thompſon *v.* Rowcroft	604, 100
Thompſon *v.* Taylor	279, 93
Tidſwell *v.* Angerſtein -	778
Tiernay *v.* Etherington -	304
Tomkins *v.* Bernett	490
Tonge *v.* Watts -	278, 92, 279
Townſon *v.* Guion -	186
Tyler *v.* Hern -	652
Tyrie *v.* Fletcher	654, 659, 783
Tyſon *v.* Gurney -	387, 564
Tarleton, Staniforth *v.* -	797
Taylor, Thompſon *v.* -	279, 93
Tellfair, Wallace *v.* -	297, 8
Terry, Leatham *v.* -	606
Tomlinſon, Loraine *v.* -	668
Thompſon, Nantes *v.*	686, 41, 114
Thompſon, Scott *v.* -	204
Thompſon, Waltham v. -	376
Thompſon, Webb *v.* -	371
Thornburgh, Whittingham *v.*	650
Thwaites, Roſs *v.* -	319
Towers, Briſtow *v.*	39, 34, 86, 697
Townſon, Cock *v.* -	195
Trenayne, Roberts *v.* -	749
Turner, Dandy *v.* -	749
Vallejo *v.* Wheeler	528, 521, 533
Vandyk *v.* Hewitt	646, 643, 649
Vandyk *v.* Whitmore -	87
Vanharthals *v.* Halhed -	83
Veedon *v.* Wilmot -	372
Viſger *v.* Preſcoti -	830
Victorin *v.* Cleeve -	372
Vizian *v.* Grant -	352
Vanhatton, Harman *v.* -	124
Van Moſes, Walrond *v.* -	388
Vaughan, M'Andrews *v.* -	232
Vaughan, Le Meſurier *v.* -	314
Vaughan, Stott *v.*	184, 202, 327
Vaughan, Whitehead *v.* -	293
Vigne, Kulen Kemp *v.*	130, 565 688, 716
Walker *v.* Witter -	393, 424
Wallace *v.* Tellfair -	297, 8
Walpole *v.* Ewer -	762
Walrond *v.* Van Moſes -	388
Waltham v. *Thompſon* -	376
Waples *v.* Eames -	264
Watts *v.* Brook -	52
Way *v.* Modigliani -	326
Waymell *v.* Reed -	647
Webb *v.* Thompſon -	371
Webſter *v.* De Taſſet -	90, 300
Webſter *v.* Forſter -	469
Weſtern *v.* Wildey -	757
Wharton *v.* De la Rive -	642
Whitehead *v.* Bance -	499
Whitehead *v.* Vaughan	293
Wilkinſon *v.* Coverdale	298, 300, 807
Williams *v.* Steadman	757
Willis *v.* Glover -	469
Willis *v.* Poole -	771
Wilſon v. *Creighton*	293
Wilſon *v.* Duckett -	650
Wilſon *v.* Marryatt	68, 183, 387
Wilſon *v.* Smith	224, 232, 234
Wittingham *v.* Thornburgh	650
Witton *v.* Reaſton -	307
Wolf *v.* Horncaſtle -	308, 115
Wood *v.* Worſley	811, 350, 790
Wooldridge *v.* Boydell	324, 184
Woolf *v.* Claggett	212
Woolmer *v.* Muilman	435
Wright *v.* Barnard	159
Walker, Jolly *v.* -	195
Walter, Mayne v.	397, 405, 418, 478
Wardell, Stitt *v.*	188, 208, 275
Watſon, Lavabre *v.* -	192
Watſon, Pawſon *v.*	458, 349, 451, 452

	Page.
Watts, Tonge *v.* 278, 92,	279
Wheeler, Vallejo *v.* 528,	521
White, Lacauſſade *v.*	646
Whitmore, Brough *v.* 723, 270,	319
Whitmore, Hore *v.*	352
Whitmore, Neſbitt *v.*	655
Whitmore, Perchard *v.*	683
Whitmore, Vandyk *v.*	87
Wilcox, Kruger *v.*	151
Wilder, Weſtern *v.*	757
Wilkinſon, Shirley *v.*	471
Williamſon, Joyce v. 754,	761
Williford, Barton *v.* -	753
Wilmer, Foſter *v.*	201
Wilmot, Veedon *v.*	372
Wilſon, Elliot *v.*	187
Wilſon, Forbes *v.*	155
Wilſon, Lavabre *v.* 192, 185,	205,
209,	275
Wilſon, Robſon v. -	294
Winſtanley, Blankley *v.* -	532
Withers, Goſs *v.* 567, 126,	501,
510, 512, 564, 580,	587
Witter, Walker *v.* 393,	424
Woodbridge, Bermon *v.* 662,	783
Woodmaſs, Sallaucci v. -	401
Woodneſs, Taylor *v.*	376
Work, Seller v. -	299
Worſley, Wood *v.* 811, 350,	790
Ximenes *v.* Jaques	119
Young, Green *v.* 510,	184

A

TREATISE

ON THE

LAW OF INSURANCE.

BOOK THE FIRST.

CHAP. XII.

Of Loss.

Preliminary Obſervations.

A LOSS, in inſurance, is the injury or damage ſuſtained by the inſured, in conſequence of the happening of one or more of the accidents or misfortunes againſt which the inſurer, in conſideration of the premium, has undertaken to indemnify the inſured. Theſe accidents or misfortunes, or *perils*, as they are uſually denominated, are all diſtinctly enumerated in every policy. And no loſs, however great or unforeſeen, can be a loſs within the policy unleſs it be the direct and immediate conſequence of one or more of theſe perils (*a*). In our common policies they are ſet forth in the following words.

Perils uſually inſured againſt.

'Touching the adventures and perils which we the 'aſſurers are content to bear, and do take upon us in this 'voyage, they are of the ſeas, men of war, fire, enemies, 'pirates, rovers, thieves, jettiſons, letters of mart and coun-'ter-mart, ſurprizals, takings at ſea, arreſts, reſtraints, and 'detainments of all kings, princes, and people, of what 'nation, condition, or quality ſoever, barratry of the 'maſter and mariners, and of all other perils, loſſes, and 'misfortunes, that have or ſhall come to the hurt, detri-'ment or damage of the ſaid goods and merchandizes, 'and ſhip, &c. or any part thereof.'

(*a*) As to the riſks which are within the common policy, vid. ch. 7. § 2.

Total loſs.

Every loſs is either total or partial. The term *total loſs* is underſtood in two different ſenſes; natural and legal. In its natural ſenſe, it ſignifies the complete and abſolute deſtruction of the thing inſured. In its legal ſenſe it means, not merely the entire deſtruction or deprivation of the thing inſured, but alſo ſuch damage to it, though it ſpecifically remain, as renders it of little or no value to the owner. A loſs is alſo ſaid to be total, if, by the happening of any of the perils or misfortunes inſured againſt, the voyage be loſt, or be not worth purſuing, and the projected adventure fruſtrated; or if the value of what is ſaved be leſs than the freight.

Partial loſs.

A partial loſs is any loſs or damage ſhort of, or not amounting to a total loſs; for if it be not the latter, it muſt be the former.—Thus, if a ſhip, inſured for a given voyage, arrive at her port of deſtination, and there remain 24 hours moored in ſafety; or, if ſhe be inſured for a *term*, and ſhe ſurvive the term; any injury which ſhe may have ſuſtained during the voyage, in the one caſe, or during the term, in the other, however great, can only amount to a partial loſs (*a*). So, in the caſe of an inſurance on goods; the inſurer contracts that they ſhall arrive ſafe at the port of delivery; or, if not, that he will indemnify the inſured. If they ſpecifically remain, and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loſs (*b*), unleſs they be rendered of no value, and altogether uſeleſs; for then the loſs is total (*c*).

To ſhip.

To goods.

Average loſs.

Partial loſſes are ſometimes denominated *average* loſſes, becauſe they are often of the nature of thoſe loſſes which are the ſubject of average contributions; and they are diſtinguiſhed into general and particular averages (*d*).

Having premiſed thus much of the nature and different kinds of loſſes, which will be found more fully conſidered under the head of *Abandonment* (*e*), we now proceed to conſider this branch of our ſubject under the following heads:

(*a*) Vid. *Cazalet* v. *St. Barbe*, *Furneau* v. *Bradley*, *Fitzgerald* v. *Poole*, inf. c. 13. § 2.——(*b*) Vid. *Cocking* v. *Fraſer*, ſup. 227.—— (*c*) Vid. *Burnet* v. *Kenſington*, ſup. 234. and *Dyſon* v. *Rowcroft*, ſup. 238.——(*d*) Vid. inf. § 7.——(*e*) Inf. ch. 13. § 1.

I. *Loſs by the perils of the ſea;*
II. ——— *colliſion;*
III. ——— *fire;*
IV. ——— *capture;*
V. ——— *arreſt and detention of princes;*
VI. ——— *barratry;*
VII. ——— *average contributions;*
VIII. ——— *ſalvage;*
IX. ——— *the death of ſlaves;*
X. ——— *the death of animals;*
XI. *Of fraudulent loſſes.*

Sect. I.

Of Loſs by the Perils of the Sea.

What is meant by perils of the ſea.

IN a large ſenſe, all the accidents or misfortunes to which thoſe engaged in maritime adventures are expoſed, may be ſaid to ariſe from the *perils of the ſea*; and, conformably to this idea, a loſs by capture was formerly holden, in our courts, to be a loſs by the perils of the ſea, as much as if it were occaſioned by ſhipwreck or tempeſt (*a*). But, in more modern times, it has been found convenient to diſtinguiſh the loſſes to which ſhips and goods at ſea are liable, by the more *immediate* cauſes to which they may be particularly aſcribed. In this view, loſſes *by the perils of the ſea* are now reſtricted to ſuch accidents or misfortunes only as proceed from mere *ſea-damage*, that is, ſuch as ariſe, *ex vi divina*, from ſtreſs of weather, winds and waves, from lightning and tempeſts, rocks and ſands, &c.

The ignorance or inattention of the maſter or mariners is not a peril of the ſea.

By the law of *France* the inſurer is not held liable for loſſes occaſioned by ignorance, or the want of care or attention, in the maſter or mariners, ſuch loſſes not being occaſioned by the perils of the ſea (*b*), or, indeed, by any other peril mentioned in the policy.—Mr. Juſtice *Lawrence*, in the caſe of *Tatham* v. *Hodgſon* (*c*), ſays,—"I do not know that it was ever decided that a loſs ariſing from

(*a*) Vid. 2 *Rol.* Ab. 248. pl. 10. *Comb.* 56. 1 *Show.* 322, 3. ——(*b*) *Pothier*, h, t. n. 64.——(*c*) 6 T. R. 656.

the miſtake of the captain, was to be deemed a loſs by the perils of the ſea."—In the caſe of *Gregſon* v. *Gilbert* (*a*), where the loſs was occaſioned by the captain's miſtaking *Jamaica* for *St. Domingo*, it was holden not to be a loſs by the perils of the ſea.

Foundering.

A loſs by the perils of the ſea may happen, *firſt*, by the ſhip's *foundering at ſea*, and then it muſt, in moſt caſes, be total in the ſtricteſt ſenſe of the word: *Secondly*, by *ſtranding*, which is either *accidental*, as where the ſhip is driven on ſhore by the winds and waves; or *voluntary*, as where ſhe is intentionally run on ſhore, either to preſerve her from a worſe fate, or for ſome fraudulent purpoſe. A ſtranding may be followed by ſhipwreck, in which caſe it becomes a total loſs; or the ſhip may be got off in a condition to proſecute her voyage, and then the damage ſuſtained, and the expences incurred, will be only a partial loſs of the nature of a general average: *Thirdly*, by the ſhip's ſtriking againſt a ſunken rock, or any other thing under water, which may occaſion the ſpringing of a leak or abſolute ſhipwreck.

Stranding.

Striking againſt a ſunken rock, &c.

If the damage can be repaired, it is a partial loſs; if not, it is total.

If, upon a ſtranding or other accident happening to the ſhip, the damage can be repaired, and the ſhip rendered capable of proceeding on her voyage; this, with reference to the ſhip, is only a partial loſs. But if a repair cannot be had at the place where the ſhip happens to be, either for want of materials or workmen, or where the maſter has no money or credit to procure any, *Valin* holds that this amounts to a total loſs, being of opinion that ſuch obſtacles to a repair ought to be conſidered as a peril of the ſea (*b*).

If a ſhip be not heard of within a competent time, ſhe ſhall be preſumed to have foundered at ſea.

It often happens that ſhips founder at ſea, and all on board periſh, and this out of the view of any perſon who could convey any information of the misfortune to the owners. In ſuch caſe, therefore, there can be no poſitive proof of the cauſe of the loſs. But where no intelligence has been received of a ſhip within a competent time after ſhe has ſailed, it may reaſonably be preſumed that ſhe foundered at ſea; becauſe a loſs proceeding from any

(*a*) Inf. ch. 16. §. 2.——(*b*) Vid. *Pothier*, h. t. n. 120.

other cauſe, would, probably, ſooner or later, have been heard of.

As, where a ſhip was inſured in 1739, from *North* 'Caroliua to *London*, with a warranty againſt captures 'and ſeizures.'—Four years after the ſhip ſailed, an action was brought on the policy, and in the declaration the loſs was alledged to have happened "*by ſinking at ſea*," and the evidence was, that ſhe ſailed on her intended voyage, and had never afterwards been heard of.—It was inſiſted, for the defendant, that, as captures and ſeizures were excepted, it lay upon the plaintiff to prove that the loſs happened in the particular manner declared on.—But Lord C. J. *Lee* ſaid, that it would be unreaſonable to expect certain evidence of ſuch a loſs, where every perſon on board is preſumed to have periſhed: And all that can be required is, the beſt proof the nature of the caſe admits of. He therefore left it to the jury, who found for the plaintiff.

Green v. *Brown*, at N. P. 2 Su. 1199.

So, where a ſhip was inſured, 'Againſt any loſs hap-'pening before the 30th of *November* 1762, free from 'average.'—The ſhip ſailed from *Newcaſtle* for *Copenhagen* (*a*), which is uſually about ten days voyage; but was taken by a *French* privateer, and ranſomed; and then proceeded on her voyage to *Copenhagen* in a bad condition. She never was heard of afterwards, though all due diligence was uſed to obtain intelligence of her, and ſeveral ſhips that ſailed after ſhe did, arrived ſafe at *Copenhagen*.—Lord *Mansfield* told the jury, that this evidence was a ſufficient ground to preſume that the ſhip periſhed at ſea, unleſs the contrary appeared. The jury accordingly found for the plaintiff.

Newby v. *Reed*, at N. P. Mich. Vac. 3 *G.* III. *Park* 63.

S. P.

In *France* and *Spain* poſitive regulations have been made, to aſcertain the time when the inſured may call on the underwriters for the loſs, on the preſumption that a miſſing ſhip had periſhed at ſea. In *Spain*, if a ſhip be not heard of for a year and a half from her departure on a

In ſome countries there is a limitation of time for this preſumption.

(*a*) It is a ſingular omiſſion in the note of this caſe, that there is no mention of the time of the ſhip's ſailing, nor how long after ſhe ſailed the plaintiff brought his action.

voyage to or from the *Indies*, ſhe is deemed loſt. In *France*, after a year from a ſhip's failing on *common voyages*, and two years on *diſtant voyages*, the inſured may abandon and demand payment without other proof of loſs (*a*).

In *England* there is no ſuch limitation.

With us there is no time fixed by law when a miſſing ſhip ſhall be preſumed to have foundered at ſea. Every caſe muſt depend on its own circumſtances; and it would be difficult to frame any certain uniform regulation for this purpoſe, that might not be productive of more inconvenience than advantage. Perſons well acquainted with maritime affairs may form a pretty correct judgment when a ſhip, in any caſe, may be reaſonably deſpaired of. When that time arrives, a liberal underwriter will pay his loſs; and if any doubt remain, he may either demand ſecurity from the inſured to refund the money, in caſe the ſhip ſhould afterwards arrive ſafe, or he may truſt to his remedy by action, to recover it back (*b*).

If a ſhip be driven on an enemy's coaſt, and there captured; this is a loſs by capture, not by the perils of the ſea.

Every loſs muſt be imputed to its immediate, and not to any remote cauſe. Therefore, if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, but not materially damaged, and ſhe be there captured; this is not a loſs by the perils of the ſea, but by *capture*; and for this the inſured may recover upon a policy againſt capture only (*c*.)

So, if part of a ſhip's crew be, by an irreſiſtible force, and at a critical moment, taken away from their employment, and, in conſequence, the ſhip drive on ſhore, the injury, thus occaſioned, is a loſs by the perils of the ſea.

Hodgſon v. *Malcolm*, 2 New Rep. 336.

Thus:—The ſhip *Dolly*, was inſured 'At and from 'Plymouth to *Sunderland*.' In an action on this policy, to recover for a loſs by the *perils of the ſea*, it appeared that the ſhip, having arrived at *Plymouth* with a cargo of coals, diſcharged a part at *Stonehouſe*, and took a pilot on board to carry the veſſel to *Sutton Pool*, to diſcharge the remainder of her cargo, and warped her down to *Stonehouſe Gut*, in her way thither; that the pilot then ſent two of the

Two of a ſhip's crew who were ſent on ſhore to caſt off a rope by which ſhe was made faſt, being impreſſed and carried away, without being allowed to caſt off the rope, the ſhip went on ſhore:—This is a loſs by the perils of the ſea.

(*a*) Vid. 2 *Mag.* 33. 177. Ord. of *Louis* XIV. h. t. art. 58. ——(*b*) Vid. *Tomkins* v. *Bernet*, 1 *Salk.* 22.——(*c*) Per Lord *Kenyon*, at N. P. *Green* v. *Elmſlie*, *Peake* 212. inf. ch. 16. § 5.

crew on ſhore, in the ſhip's boat, to make faſt another line to the ſhore, and to caſt off their former; that theſe men were immediately impreſſed by ſome officers, upon which the maſter deſired they would ſuffer the men to caſt off the rope, and to ſend off the boat to the ſhip, being the only one belonging to her, but they would not do either, and carried away and kept the men for three quarters of an hour, and then ſent them back to the ſhip; that in conſequence of the rope not being caſt off, the bows of the ſhip were checked, and ſhe went aſhore nearly at high water, where ſhe grounded; that a part of her cargo being taken out into lighters, ſhe was got off, but, in conſequence of her being aſhore, ſhe was much ſtrained and made a great deal of water.—Upon this caſe it was objected on the part of the defendant, that this was not a loſs by the perils of the ſea, but by the miſconduct of the officers on ſhore in not permitting the rope to be caſt off, and the underwriters were not anſwerable for the miſconduct of the officers, againſt whom the plaintiff might bring an action.—But the court (*a*) held that, as the waves of the ſea were the immediate cauſe of the ſhip's being driven on ſhore, and as no blame was imputable to thoſe who had the management of the ſhip, it muſt be conſidered as a loſs by the perils of the ſea, and therefore that the plaintiff was entitled to recover.

If ſlaves be thrown overboard, on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe; this is not a loſs by the perils of the ſea.

But, if the maſter of a ſlave ſhip miſtake his courſe, whereby a ſcarcity of water enſues, and a number of ſlaves are thrown overboard to ſave the reſt; it will not be ſufficient for the inſured, in declaring for this loſs, to ſtate that, by contrary winds and currents, and *the perils of the ſea*, the ſhip was retarded, and the ſlaves periſhed for want of water (*b*).

So, if the ſlaves die for want of food, occaſioned by the extraordinary length of the voyage.

So, where a number of ſlaves periſhed for want of ſufficient and proper food, and this failure was occaſioned by extraordinary delay in the voyage, ariſing from bad and ſtormy weather; this was holden to be a loſs by natural death, and not by the perils of the ſea (*c*).

(*a*) Mr. Juſtice *Heath*, Mr. Juſtice *Rooke*, and Mr. Juſtice *Chambre*, againſt the opinion of Sir *James Mansfield* Chief Juſtice. ——(*b*) R. *Greg ſon* v. *Gilbert*, inf. ch. 16. § 2.——(*c*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656.

So,

Rhet v. *Parr*, 1 *Eſp.* Rep. 444. Inſ. ch. 14. § 1.

If a ſhip be deſtroyed by worms, this is not a loſs by the perils of the ſea.

So, where a ſhip was inſured from *St. Bartholomew* to the coaſt of *Africa*, and during her ſtay and trade there, and back to *St. Bartholomew*.—In an action upon this policy, for a total loſs by the *perils of the ſea*, the evidence was that ſhe had been deſtroyed by the worms, which are well known to infeſt the rivers in hot climates.—But a merchant ſwore, that he had known many inſtances of loſs by this ſpecies of injury, but that the underwriters had uniformly refuſed to pay.—Lord *Kenyon* who tried the cauſe, decided, upon this evidence, that this was not a loſs by the perils of the ſea; and the jury unanimouſly concurred with his lordſhip, and found a verdict for the defendant.

The inſurer is not anſwerable for any damage to the ſhip, occaſioned by the ordinary ſervices ſhe is engaged in.

It is ſingular, that among the great variety of queſtions which have been agitated in our courts upon almoſt every ſubject of the law of inſurance, not one has yet, I believe, occurred in which the line between the damage to the rigging and furniture of the ſhip for which the *owner*, and that for which the *inſurer* is liable, has been diſtinctly drawn. It is clear that the inſurer is not anſwerable for any deterioration of the ſhip, her rigging or furniture, occaſioned by the ordinary ſevice in which ſhe is engaged. As to the accidents which occaſionally happen to the rigging and furniture, foreign writers have attempted to lay down the rule. They ſay that if a cable break by the friction of the rocks, and an anchor be loſt, the inſurers are not anſwerable. But if by ſome extraordinary accident, as the violence of the winds or waves, it become neceſſary to ſlip a cable, or a cable be broke, and an anchor loſt, or a ſail or yard be carried away, this is a loſs by the perils of the ſea within the policy (*a*).

This, however, is not quite ſatisfactory. The beſt guide, perhaps, upon this ſubject, is the rule which governs average contributions. According to that rule, no injury, however great, occaſioned by mere ſea-damage in the ordinary employment of the ſhip, can be the ſubject of a general average.—For this reaſon, no ſuch injury

(*b*) *Valin*, art 29, p. 76, *Pothier*, h. t. n. 66. *Emerig* tom. 1. p. 393.

ought

ought, I conceive, to be deemed a loſs by the perils of the ſea, within the meaning of the policy (*a*).

Sect. II.

Of Loſs by Colliſion.

A SPECIES of damage to which ſhips at ſea are often expoſed, is that occaſioned by *colliſion*, which is the caſe of one ſhip driving againſt, or running foul of, another. This may be the effect of mere accident, without blame being imputable to the maſter of either ſhip; or it may be occaſioned by the negligence, unſkilfulneſs, or miſconduct of one or both of them. In general, by the marine law, an injury done by colliſion to a ſhip or her cargo, where no blame is imputable to the maſter of either, the loſs is to be be equally borne by the owners of both (*b*). But this rule is not adopted by the law of *England*. For with us, when damage of this ſort has been occaſioned by mere misfortune, and without fault in any one, the owners of the ſhip or cargo damaged muſt bear their own loſs; this being conſidered as a peril of the ſea (*c*); and in this, our law agrees with the civil law (*d*). The injury, thus occaſioned, being a peril of the ſea, is holden to be a loſs within the policy (*e*), unleſs it be imputable to the miſconduct of the maſter or mariners of the ſhip inſured; in which caſe the inſurer is not liable, according to the opinion of *Emerigon* (*f*). But in ſuch caſe, the wilful miſconduct of the maſter or mariners would, I conceive, amount to barratry. An action, however, would lie againſt the maſter of either ſhip, to whom negligence or miſconduct, is imputable for the injury done to the other (*g*).

(*a*) Vid. inf. § 7. in which the ſubject of general average is fully conſidered.——(*b*) Laws of *Oleron*, art. 14, of *Wiſbuy*, art. 26, 50, 67, 70, Ord. of *Louis* XIV. tit. *Avaries*, art. 11, *Valin* thereon, *Bynk.* Queſt. *Jur. Priv.* lib. 4, c. 18, 19, 20, 21.——(*c*) Per Lord *Kenyon*, in *Buller* v. *Fiſher*, at G. H. after *Mich.* 1800.——(*d*) ff. 9, 2, 29.——(*e*) Vid. Ord. de *Louis* XIV., tit. *Avaries*, art. 11. and tit. *Aſſurance*, art. 26. ——(*f*) Vid. *Emerig.* tom. 1. p. 413. Vid. *Pothier*, h. t. p. 50, 65.——(*g*) Vid 3 *Rob.* Adm. Rep. 345.

Sect.

Sect. III.

Of Loſs by Fire.

Whether a loſs by fire, imputable to the fault of the maſter or mariners, be a loſs within the policy.

There can be no doubt but that a loſs occaſioned by fire which is merely accidental, and not imputable to any fault of the maſter or mariners, is a loſs within the policy; and in many places the inſurer is held to be liable, even where the fire happens by the fault of the maſter or mariners (*a*). But in *France* the inſurer is not held anſwerable in ſuch caſe, unleſs, by the policy, he be liable for barratry (*b*).

If a ſhip be burnt by order of the ſtate where ſhe happens to be, to prevent infection; this is a loſs within the policy.

Emerigon mentions two caſes on this ſubject—In the one, a *Dutch* veſſel was refuſed admittance into the port of *Majorca*, and was burnt by the *Spaniards*, from an apprehenſion that ſhe had the plague on board: There the inſurer was holden to be liable, no blame being imputable to the maſter or mariners.—In the other, a ſhip, with the plague on board, of which ſeveral perſons had died, was carried into the port of *Marſeilles*, the maſter pretending that the deaths were occaſioned by *unwholeſome food*. The infection was communicated to the town and neighbouring country. The ſhip was burnt.—Here it was determined that the inſurer was not liable, upon the ground that the loſs was occaſioned by the miſconduct of the maſter (*c*). In this caſe barratry could not have been one of the perils inſerted in the policy.

If a ſhip be attacked by an enemy, and the maſter find it impoſſible to defend her, *Valin* and *Pothier* hold, that he may leave her and ſet her on fire, to prevent her falling into the enemy's hands, provided he can preſerve the lives of the crew. In ſuch caſe, the inſurer is liable for the loſs; for the maſter was juſtified in burning the ſhip under ſuch circumſtances (*d*).

(*a*) *Straccha*, gl. 18. *Targa*, ch. 65. *Emerig.* tom. 1, p. 434. ——(*b*) *Pothier*, h. t. n. 53. *Emerig.* ut ſup.——(*c*) *Emerig.* ut ſup.——(*d*) *Pothier*, h. t. n. 53, 65. *Valin*, art. 26. h. t.

Sect.

Sect. IV.

Of Loſs by Capture.

CAPTURE is when a ſhip is ſubdued and taken by an enemy in open war, or by way of repriſals, or by a pirate, and with intent to deprive the owner of it.— Capture may be with intent to poſſeſs both ſhip and cargo, or only to ſeize the goods of the enemy, or contraband goods, which are on board. The former is a capture of the ſhip in the proper ſenſe of the word; the latter is only an arreſt and detention, without any deſign to deprive the owner of it..—Capture is deemed *lawful*, when made by a declared enemy, lawfully commiſſioned, and according to the laws of war; and *unlawful*, when it is againſt the rules eſtabliſhed by the law of nations.

What ſhall be deemed a capture.

But for every loſs occaſioned by capture, whether lawful or unlawful, the inſurer is liable (*a*), the words of the policy being ſufficiently comprehenſive to include every ſpecies of capture to which ſhips at ſea can ever be expoſed.

Every capture, whether lawful or unlawful, is a loſs within the policy.

And in every caſe of capture the inſurer is anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained. This may be either *total*, as where the ſhip or goods inſured are not recovered again; or *partial*, as where the ſhip is recaptured or reſtored before abandonment; in which caſe the inſurer is bound to pay the ſalvage, and any other neceſſary expence which the inſured may have been put to for the recovery of his property (*b*).

And the inſurers are anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained.

And the inſurer is liable for a loſs by capture, whether the property in the thing inſured be changed by the capture or not. For a ſhip is loſt by capture, though ſhe be never condemned, or even carried into any port or

And they are liable whether the property be changed or not by the capture.

(*a*) *Le Guidon*, ch. 7. n. 1. *Caſaregis*, diſc. 1. n. 118. *Roccus*, n. 41. 54. 55, 64, 66. *Valin*, art. 26, h. t. *Pothier*, h. t. n. 54.——(*b*) As to ſalvage, vid. inf. § 8.

fleet

fleet of the enemy. It can never, therefore, be a queſtion between the inſurer and the inſured, whether the capture be lawful or not, or whether the property be changed by condemnation or by being carried into an enemy's port. A capture by a pirate, or under a commiſſion, when there is no war, does not change the property; and yet, as between the inſurer and the inſured, the effect is the ſame, as in the caſe of a capture by an enemy in open and declared hoſtilities: For whatever rule ought to be obſerved in queſtions of this ſort, as between the owner and the *recaptor*, or his *vendee*, it can in no way affect the caſe, as between the *inſured* and the *inſurer*.

Therefore the effect of capture and recapture, in diveſting or reveſting the property, can make no queſtion, except in inſurances without intereſt.

Therefore, as to the length of poſſeſſion by an enemy, which is deemed ſufficient to diveſt the property out of the original owner, or the effect of a re-capture in reveſting it,—theſe are now matters which can never come directly in queſtion between the inſured and the inſurer. They never could have come in queſtion, in any caſe of inſurance upon *real intereſt*; becauſe, according to the above principles, they never could have varied the caſe. They could only have had their origin in gaming inſurances, in which there could be no average or benefit of ſalvage, and in which, therefore, it was always neceſſary to ſet up a total loſs, for the purpoſe of the wager. In gaming inſurances, when there was a re-capture, the claim, as for a total loſs, ſeems formerly to have involved the queſtion, whether the property in the thing inſured had, by the capture, or any proceeding founded on it, been diveſted out of the original owner, or not, before the re-capture.

And yet, where a ſhip is inſured '*intereſt or no intereſt*,' a capture, however illegal, and though the ſhip be retaken, is a total loſs.

And yet the following caſes will ſhew that, upon inſurances, '*intereſt or no intereſt*,' it has been repeatedly determined that if the ſhip be taken, it is a total loſs, however illegal the capture may be, and though the ſhip be retaken and reſtored to the owner.

It is obſervable, however, that the policies in the firſt, ſecond, and fourth of theſe caſes, though they contained the words '*intereſt or no intereſt*,' were evidently inſurances upon real intereſt.—Lord *Mansfield*, indeed, in his obervations

obſervations on the firſt of them (*a*), ſays, 'that it was the caſe of a *wager policy*; and the ſhip having been once in fact taken, the event had happened againſt which the inſurance was made, though ſhe was afterwards recovered.'—But his lordſhip muſt have been miſled by the words, '*intereſt or no intereſt*,' to ſuppoſe this to have been a wager policy; for it is plain, from the judgment, that the court conſidered the plaintiff as intereſted in the ſhip.

De Paiba v. *Ludlow*, 1 *Com.* 361.

The capture of a ſhip inſured, '*intereſt or no intereſt*,' is a total loſs, though it be illegal, and the ſhip recaptured.

In the firſt of theſe caſes, a ſhip, inſured '*intereſt or no intereſt*,' was taken by a *Swediſh* pirate, and after continuing in his poſſeſſion for nine days, was re-taken by an *Engliſh* man of war, and carried into *Harwich*, but not till after an action was brought on the policy:—The court held that though the ſhip was re-taken, yet the plaintiff received a damage, for his voyage was interrupted; that the queſtion was, not whether the plaintiff ſhould have his ſhip again, and ſhould not loſe his property, but what damage he had ſuſtained.

Pond v. *King*, 1 *Wilſ.* 191.

A privateer inſured for a three months cruiſe, '*intereſt or no intereſt*,' is taken, and after three days is retaken; yet it is a total loſs.

The next was, where a privateer was inſured 'for three 'months, *intereſt or no intereſt*, free from average, and without 'benefit of ſalvage.'—The ſhip was taken by a *French* ſhip of war, within the three months; her guns and 117 of her men taken out of her, and carried into *France*. But after ſhe had remained in poſſeſſion of the enemy for three whole days, and before ſhe was carried into any port of the enemy, ſhe was retaken by an *Engliſh* privateer, and carried into *Liſbon*, before the expiration of the three months; ſo that by the capture ſhe was prevented from finiſhing her cruiſe. It appeared that the inſured was intereſted to more than the amount of the ſum inſured; and that the maſter of the privateer had obtained a decree, in the court of admiralty of *Gibraltar*, that the ſhip ſhould be reſtored to the owners, on payment of one third part for ſalvage.—The court determined that, though the ſhip was never carried *infra præſidia hoſtium*, this was not a

(*a*) Vid. Lord *Mansfield*'s obſervations on *De Paiba* v. *Ludlow*, 2 *Bur.* 695.

partial, but a total, loſs to the inſured.—Lord C. J. *Lee*, in delivering the opinion of the court, ſaid;—"Although, by the civil law, it may not, perhaps, be adjudged a total loſs, yet the rules of that law are not to govern us, but we muſt give our judgment according to the common law of *England*, upon this agreement between the parties, whoſe intention appears and muſt guide us. By the civil law, there muſt be a total loſs, to entitle the inſured to recover; but the policy, in this caſe, extends to captures and other accidents.—The meaning of the parties here is plain: The inſured paid his premium in conſideration of the inſurer's undertaking that the ſhip ſhould cruiſe ſafely for three months; the jury have found that ſhe was diſabled from proſecuting her cruiſe for three months. The inſurance is to be underſtood for the cruiſe of three months, and in common ſenſe it cannot be otherwiſe; ſo that, as ſoon as the voyage is broken or interrupted, the cruiſe is at an end. Safety during the three months is what is meant; but it appears that the ſhip was taken and detained within that time, and that the plaintiff was hindered in his cruiſe; and this, by our law, is a total loſs to the plaintiff. I have avoided ſaying any thing on the queſtion, whether this was a prize or not, as having never been carried *infra præſidia hoſtium*, becauſe we are all of opinion that this is a total loſs."

Bent v *Dicker*, at N. P. 2 Str. 1250.

In the third of theſe caſes, the inſurance was, '*on goods, intereſt or no intereſt*, at and from *Jamaica* to *Briſtol*.'—The ſhip in her paſſage was taken by a *Spaniſh* privateer, and carried into a port in *Spain*, kept there eight days, and then cut out by an *Engliſh* ſhip.—The plaintiff inſiſted that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip, and therefore, he was entitled to recover as for a total loſs.—The defendant contended that, by the ſtat. 13 *G.* II. c. 4. the ſhip and cargo were to be reſtored to the owners upon paying ſalvage (*a*); and that this was only an average loſs, and the plaintiff

Goods are inſured '*intereſt or no intereſt*.' The ſhip is taken and carried into the enemy's port; and after eight days cut out, and reſtored to the owner, on payment of ſalvage; yet the inſured ſhall recover as for a total loſs.

(*a*) Vid. inf. § 8. how ſalvage is at preſent regulated.

could only recover in the caſe of a total loſs.—Lord C. J. *Lee* held, that the plaintiff was entitled to recover: For this was a wager upon a total loſs, and here had happened one, by the ſhip's being carried into port, and there detained eight days; that where the policy is, '*intereſt* '*or no intereſt*,' the proviſions of the act, in caſes of valued policies, could not take place; that the act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to the *former owner*; but, that it might be otherwiſe, where the ſhip was re-captured before ſhe was carried *infra præſidia*; or in caſe of goods actually on board, and upon a valued policy.

The laſt of theſe caſes was where an inſurance was made on a ſhip '*intereſt or no intereſt, free of average*, &c. from *Jamaica* to *Hull*.'—In her voyage ſhe was taken by a *French* privateer and carried into *Hamburgh*; and after being twelve days in the hands of the enemy, was retaken by an *Engliſh* ſhip, and brought to *London*, where ſhe was adjudged to be reſtored to the owner, paying ſalvage.—The owner ſold the ſhip and paid the ſalvage.—In an action on the policy, this was holden to be a loſs of the voyage; and a verdict was given accordingly.

Whitehead v *Bance*, at N. P. B. R. Mich. 1749. *Park* 77.

A captured ſhip inſured '*intereſt* '*or no intereſt*,' is retaken after 12 days, and ſold by the owner to pay the ſalvage: —This is a total loſs.

But though no queſtion can now ariſe, between the inſured and the inſurer, as to the effect of a capture, or re-capture, in diveſting or reveſting the property; yet, as it may ſometimes be of importance, in matters of inſurance, to know how the law ſtands on this ſubject, it may not be improper, here, to enquire, ſhortly, when a capture ſhall be deemed to transfer the property to an enemy, and what ſhall be the effect of a re-capture in reveſting it in the original owner.

The effect of a capture and re-capture in diveſting or reveſting property.

Voet on the pandects, and ſeveral authors he refers to, maintain with great earneſtneſs, *per ſolam occupationem, dominium prædæ hoſtibus acquiri.* (*a*). But the general opinion ſeems to be, that by the law of nations, the pro-

Opinions of different authors on this ſubject.

(*a*) *Voet*, lib. 49, tit. 15, vol. 2, p. 1155.

perty

perty of things captured in war is changed when all reaſonable hope of recovering them is gone; and, with reſpect to things moveable, all reaſonable hope of recovering them is preſumed to be gone when they are brought within the protection of the enemy's fortreſs (*a*).

But what cuſtody of ſhips or effects taken at ſea, ſhall be equivalent to a placing of things captured on land *infra præſidia*, is a ſubject of much doubt and diſpute. *Grotius* ſays, that ſhips or goods taken at ſea become the property of the captors, when they are brought into the enemy's harbours, or to the place where his whole fleet is ſtationed; for then all hopes of recovering them may be ſaid to vaniſh. But, he adds, that by the law of nations, as introduced among *European* ſtates in more modern times, things are conſidered as captured, when they have been 24 hours in the power of the enemy (*b*).

Bynkerſhoek, and ſeveral writers whom he follows, abſolutely deny this pretended rule of the law of nations, and inſiſt on the rule of the *Roman* law, that the prize muſt be carried *infra præſidia*, before it can become the property of the captor; and by *præſidia* he underſtands the *camps*, the *ports*, the *towns*, and the *fleets*, of the enemy (*c*).

Other writers have drawn other lines, by arbitrary diſtinctions, partly from policy, to prevent too eaſy a diſ-

---

(*a*) *Cæterum in hâc belli quæſtione placuit gentibus, ut cepiſſe rem is intelligatur qui ita detinet ut recuperandi ſpem probabilem alter amiſerit, aut ut res perſecutionem effugerit. Hæc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id eſt præſidia hoſtium, perducta fuerint. Grot.* de jur. bel. ac pac. lib. 3. c. 6. § 3. Vid. *March* Rep. 116.——(*b*) *Cui conſequens eſſe videtur, ut in mari navis et res aliæ captæ cenſeantur tum demum cum in navalia aut portus, aut ad eum locum ubi tota claſſis ſe tenet, perducta ſunt.—Nam tunc deſperari incipit recuperatio. Sed recentiori jure gentium inter* Europæos *populos introductum videmus, ut talia capta cenſeatur ubi per horas viginti quatuor in poteſtate hoſtium fuerint. Grot.* ubi ſup.—Vid. *Conſolato del Mare*, c. 283, 287. *Roccus*, not. 66.——(*c*) Vid. *Bynk.* jur. pub. lib. 1, c. 4.

poſition

poſition to neutrals, and partly from equity, to extend the *jus poſtliminii*, or the right of reclaiming what has been recovered from the enemy, in favour of the original owner. No wonder, therefore, that there is ſo much uncertainty, and ſuch a variety of notions among them about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the ſubject of reaſon alone. (*a*).

How conſidered by the law of *England*.

In our courts of admiralty it has always been holden that, by the marine law of *England*, independently of the ſtatute which commands reſtitution, and fixes the rate of ſalvage, the property is not changed in favour of a vendee or recaptor, ſo as to bar the original owner, till there has been a regular ſentence of condemnation: And in the reign of King *Charles* II. a ſolemn judgment was given upon this point; and reſtitution of a ſhip taken by a privateer was decreed, after ſhe had been fourteen weeks in the enemy's poſſeſſion, *becauſe ſhe had not been condemned* (*b*). The ſame doctrine has, in ſeveral inſtances prevailed in our courts of common law (*c*). In one caſe it was holden that nine days poſſeſſion by the captor, and in another, that four years poſſeſſion, and ſeveral voyages performed, will not change the property, without a ſentence of condemnation (*d*).

The inſurer is liable for all charges occaſioned by the capture.

When there has been a capture, whether legal or not, and the ſhip has been recaptured or reſtored before abandonment, the inſurer is bound to defray all neceſſary expences which the inſured has been put to for the recovery of his property. He is therefore liable for a ſum of money paid by the inſured to the captors, as a *compromiſe* made *bonâ fide*, to prevent the ſhip from being condemned as prize.

(*a*) Vid. Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 695.——(*b*) Cited by Lord *Mansfield* as a caſe reported to him by Sir *Geo. Lee*. Vid. *Goſs* v. *Withers*, 2 *Bur.* 695.——(*c*) *Aſſievedo* v. *Cambridge* 10 Mod. 79.——(*d*) —— v. *Sands*, 10 Mod. 79. See Lord *Mansfield*'s obſervations on theſe caſes, 2 *Bur.* 695. The caſes themſelves are ſo defectively reported, that I have not thought them worthy of a more particular notice.

Berens v. *Rucker*, at N. P. 1 Bl. 313.

A ſhip, warranted neutr l, is captured as an enemy's ſhip, and the owners, after an interlocutory decree againſt them, agree to a compromiſe:—This being done *bonâ fide*, the inſurer is liable for the ſum paid under ſuch compromiſe

Thus:—The *Dutch* ſhip *Tyd* and her cargo were inſured 'At and from *St. Euſtatia* to *Amſterdam*, warranted '*Dutch* property, and not laden in any *French* port in the '*Weſt Indies*.'—In *May* 1758 the ſhip took in a cargo of ſugars, indigo, and other *French* commodities, partly out of barks, partly from the ſhore. On the 18th of *June* ſhe ſailed on her voyage, and on the 27th was taken by an *Engliſh* privateer, and carried into *Portſmouth*, proceedings in the court of admiralty were begun in *Auguſt*, and after many delays and citations from court to court, an interlocutory order was pronounced, in *February* 1759, for the contumacy of the claimants in not ſpecifying what part of the cargo was taken from the ſhore, what from barks; and it was decreed that the goods ſhould be preſumed *French* property. There was an appeal to the lords commiſſioners of prizes, but as many cauſes ſtood before it, the market very high, and the cargo in part periſhable, the agent of the owners agreed with the captors to give them 800 l. and coſts, to obtain the reverſal of the ſentence. This was obtained by conſent, and it was decreed that there was a ſufficient cauſe of ſeizure, in order to give coſts to the captors, and reſtitution was decreed to the owners. After the ſhip's arrival at *Amſterdam*, the chamber of inſurances there ſettled the average of the loſs and expences occaſioned by the capture, detention, and litigation; and for this the action was brought.—Lord *Mansfield* ſaid;—"The firſt queſtion is, whether this was a juſt capture (*a*). Both ſentences are out of the caſe, being done and undone by conſent. The capture was unjuſt. The pretence was, that part of this cargo was put on board off *St. Euſtatia*, out of barks ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. It is now a ſettled point, that it is the ſame thing as if they had been landed on the *Dutch* ſhore, and put on board afterwards, in which caſe there is no colour for ſeizure. The

If the produce of an enemy's country be brought from thence in barks and put on board a neutral ſhip; this will be the ſame as if the goods had been ſhipped from the ſhore in a neutral port. But a neutral ſhip,

(*a*) This became a queſtion, on account of the warranty that the ſhip and cargo were *Dutch* property; for if the capture had been juſt, it would have falſified the warranty.

rule

rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port; for it may be purchaſed of neutrals.—The ſecond queſtion is, whether the owners have acted *bonâ fide* and uprightly, as men acting *for themſelves*, and upon a reaſonable footing; ſo as to make the expences of this compromiſe a loſs to be borne by the inſurers. The judge of the admiralty's order to ſpecify was illegal, contrary to the marine law, and to the act of parliament which is declaratory of the marine law: Becauſe, if they had ſpecified, it would be of no conſequence, according to the rule before-mentioned. Yet the captors were in poſſeſſion of a ſentence, though an unjuſt one. And a court of appeal cannot, or ſeldom does, give coſts or damages which have accrued ſubſequent to the original ſentence; for thoſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000 l.; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negociated the compromiſe. The chamber of commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been reverſed, the coſts muſt have fallen heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, to avoid a total one." The jury found for the plaintiff.

trading to an enemy's colony, with all the advantages of an enemy's ſhip, is liable to capture.

Formerly it was a common practice to ranſom *Britiſh* ſhips, when captured by an enemy, by delivering to the enemy what was called a ranſom bill, which ſecured to the captor the price agreed upon, and operated as a bill of ſale of the ſhip and cargo to the original owners, and as a protection to the ſhip againſt other cruiſers of the enemy during the remainder of her voyage. A hoſtage was delivered to the captor to ſecure to him the punctual payment of the ſtipulated ſum.

Of ranſoming captured ſhips.

Actions at common law were formerly maintained on ranſom bills.

This ranſom bill, independently of the hoſtage, was conſidered as a contract of the law of nations, and obligatory upon the owners as well as upon the captain and hoſtage who ſigned it (*a*); and actions have been often brought upon them in our courts of common law. And where the ſhip or goods were inſured, the amount of the ranſom was uſually taken to be the meaſure of the demand of the inſured upon the underwriters in reſpect of the capture (*b*).

Anthon v. *Fiſher*, *Doug.* 648, 9.

But now an alien enemy cannot ſue for any right acquired by actual war.

But at length, in an action on a ranſom bill, which came before the court of King's Bench in *Trinity* Term 1782, it was contended on the part of the defendant, that as queſtions on ranſom bills ariſe out of *matter of prize*, and are to be decided therefore by the *jus belli*, ſuch queſtions are not triable in any court of common law, but belong excluſively to the courts of prize.—The judges of that court differing in opinion upon this queſtion, they gave judgment for the plaintiff *pro formâ*, and the cauſe being removed by writ of error to the *Exchequer Chamber*, it was there unanimouſly determined, that an alien enemy cannot, by the municipal law of this country, ſue for the recovery of a right claimed to be acquired by him in actual war, and the judgment of the Court of King's Bench was reverſed.

And now, by ſtat. 22 G. III. c. 35, it is declared unlawful to ranſom any *Britiſh* ſhip taken by the enemy.

But this practice of ranſoming ſhips captured by the enemy being found to operate more to the diſadvantage than for the benefit of this country, it was at length thought proper to prohibit it altogether. And therefore by ſtat. 22 *G.* III. c. 25. § 1. it is enacted, 'That it 'ſhall not be lawful for any of his Majeſty's ſubjects 'to ranſom, or to enter into any contract or agreement 'for ranſoming, any ſhip or veſſel belonging to any of 'his Majeſty's ſubjects, or any merchandize or goods 'on board the ſame, which ſhall be captured by the ſub-'jects of any ſtate at war with his Majeſty, or by any 'perſon committing hoſtilities againſt his Majeſty's ſub-'jects.' And by § 2. 'All contracts and agreements which

(*a*) *Si quid ſinguli hoſti promiſerint, eſt in eo fides ſervanda*, *Cic.* Vid. *Burlamaqui*, part. 4. ch. 4. *Vattel*, liv. 3, ch. 16, § 233. *Grot.* lib. 3, ch. 21, § 1.—(*b*) Vid. *Ricord* v. *Bettenham*, 3 *Bur.* 1734, 1 *Bl.* 563. *Cornu* v. *Blackburne*, *Doug.* 619.

'ſhall

'shall be entered into; and all bills, notes, and other se-'curities, which shall be given by any person or persons 'for ransom of any such ship or vessel, or of any mer-'chandize or goods on board the same, shall be absolutely 'void in law, and of no effect whatever.' And, by § 3, a penalty of 500 l. is given to the informer, for every offence against the act. This statute has put an end to all questions on the law of ransoms.—And yet it is singular that though this act has no clause of limitation, as to its duration, and is therefore perpetual, the same provisions are re-enacted in the same words, by each of the two last prize acts, 33 *G.* III. c. 66, § 37, 38, 39, and the 43 *G.* III. c. 160, § 34, 35, 36; and in this last act, § 34, the words, "Unless in the case of extreme necessity, to "be allowed by the court of admiralty," are added to the first clause; and yet both these acts are only to continue during the respective wars for which they were made.

If a ship be recaptured before she is carried into an enemy's port, she may, with the consent of the recaptors, prosecute her original voyage.

It often happens that a recaptured ship is in a state to prosecute her original voyage; and, in that case, it is the interest of the recaptors, as well as of the other parties concerned, that she should be permitted to do so. The last prize act (*a*) has therefore very properly provided, 'That if a ship be retaken before she has been carried 'into an enemy's port, it shall be lawful for her, if the 'recaptors consent thereto, to prosecute her voyage; and 'it shall not be necessary for the recaptors to proceed to 'adjudication till six months after the recapture, or till 'the return of the ship to the port from whence she 'sailed; and the master, owners, or agents, with the 'consent of the recaptors may dispose of their cargoes 'before adjudication: And in case the vessel shall not re-'turn to the port from whence she sailed, or the recaptors 'shall have had no opportunity of proceeding regularly to 'adjudication within the six months, on account of the 'absence of the said vessel, the court of admiralty shall, at 'the instance of the recaptors, decree restitution to the 'former owners, they paying salvage, upon such evi-'dence as to the court shall, under all the circumstances 'of the case, appear reasonable; the expence of such pro-'ceeding not to exceed *fourteen pounds*.'

And the recaptors shall not be obliged to proceed to adjudication, till after six months, or the return of the ship.

(*a*) Stat. 43 *G.* III. c. 160. § 41.

Sect.

Sect. V.

Of Loſs by Detention of Princes.

BY the terms of the policy the inſurer is anſwerable for all loſs occaſioned by "*arreſts or detainments of all "kings, princes, and people, of what nation, condition, or "quality ſoever.*" Under theſe words, which are nearly the ſame in the policies of all the other maritime countries of *Europe*, the inſurers are liable for all loſſes occaſioned by arreſts or detention of the ſhip or goods inſured, by the authority of any prince, or public body claiming to exerciſe ſovereign power, under what pretence ſoever.

What ſhall be deemed an arreſt and detention of princes.

As if the ſovereign of the country to which a ſhip belongs, or any other ſovereign, not at war with him, from motives of neceſſity, not of hoſtility, arreſt the ſhip either ſingly, or together with others in the ſame port or harbour; this is a detention of princes (*a*).

Difference between capture and arreſt of princes.

There is an obvious difference between capture and arreſt of princes: The object of the one is prize; that of the other detention, with a deſign to reſtore the ſhip or goods detained, or to pay the value to the owner. And though neither of theſe ſhould be done, ſtill it muſt be conſidered as an arreſt of princes, becauſe the character of any action depends on the original deſign with which it was done.

If a ſhip be detained, upon a war breaking out; this is *capture*, not arreſt.

When a ſhip is detained in a port after a declaration of war, or the iſſuing of letters of repriſal, againſt the country or ſtate to which ſhe belongs; this more reſembles *a capture* than a detention, and gives the inſured an immediate right to abandon, as for a loſs by capture, even though no condemnation be pronounced, and though the ſhip be afterwards reſtored (*b*).

(*a*) Vid. *Le Guidon*, ch. 7, art. 6, and ch. 9, art 6, and 13; *Valin*, tom. 2, p. 416.——(*b*) Vid. *Pothier*, h. t. n. 56.

An

It may be at ſea as well as in port.

An arreſt of princes may be at ſea as well as in a port or harbour, provided it be done from public neceſſity, not with a view to plunder. *Roccus* (*a*) mentions the caſe of a *Genoeſe* ſhip laden with corn, which was ſeized *at ſea* by the *Venetian* gallies, and carried into *Corfu*, where there was a famine at the time, and there ſold and paid for.—The inſured inſtituted a ſuit in the *Rota* of *Genoa* againſt the inſurers, and inſiſted that this was a *capture* for which they might abandon. The inſurers anſwered that this was merely a *detention of princes*, the object of which was not to capture the ſhip, but to purchaſe the corn which the neceſſity of the public required. *Diverſio facta fuit, non ad capiendam navim, ſed ob publicam utilitatem grani conſequendi cauſâ. Licuit frumenta accipere, ſoluto pretio.*—This was held to be a good defence.

Seizing a corn ſhip at ſea, for the relief of a place ſuffering under a famine, is only an arreſt of princes, not a capture.

But if a neutral be taken at ſea, under pretence that ſhe is an enemy, this is a capture.

And yet, if a neutral ſhip be arreſted at ſea, and carried into a port belonging to one of the belligerent powers, under pretence that ſhe belongs to the enemy, or that ſhe is laden with enemy's goods; this muſt be conſidered as a *capture*, becauſe it is done *as an act of hoſtility*; and the ſhip's being afterwards reſtored, will not change that which was originally a capture into a detention of princes (*b*).—But in the caſe of *Saloucci* v. *Johnſon*, already particularly mentioned (*c*), the court of King's Bench determined, that the refuſal of a neutral to ſubmit to a ſearch by a *Spaniſh* ſhip of war, and reſiſting with force, was no forfeiture of the ſhip's neutrality; and that the ſhip being arreſted and carried into *Spain* for this reſiſtance, the inſured was intitled to recover againſt the underwriters as for "*an improper detention.*" And though it has ſince been determined, both in the court of King's Bench and the court of admiralty, that reſiſting a ſearch is a lawful cauſe of capture and confiſcation (*d*), yet the above caſe of *Saloucci* v. *Johnſon*, may nevertheleſs, I conceive, be conſidered as an authority to prove that if a neutral ſhip be *unlawfully* arreſted and

So, if it be under pretence that ſhe committed an offence againſt the law of nations.

(*a*) h. t. n. 60.——(*b*) *Emerig.* tom. 1. p. 537.——(*c*) Sup. 387.——(*d*) Sup. 389.

detained

detained by a belligerent cruiſer for any pretended offence againſt the law of nations, this would be a detention of princes.

But if a ſhip be ſeized for navigating againſt the laws of a foreign ſtate, this is not a detention of princes.

But if a ſhip miſconduct herſelf; as by navigating againſt the laws of a foreign country, which ſhe is bound to obſerve, or for not paying cuſtoms, &c. and thereby ſubject herſelf to ſeizure or confiſcation; this ſhall not be deemed a loſs by reſtraint or detention of princes (*a*); though, perhaps, it may amount to barratry of the maſter (*b*).

Embargo.

The moſt frequent cauſe of detention is an embargo, which is a proclamation or order of ſtate, uſually iſſued in time of war, or threatened hoſtilities, prohibiting the departure of ſhips or goods from ſome or all of the ports of ſuch ſtate until further order. An embargo laid on ſhips and merchandize in the ports of this kingdom by virtue of the king's proclamation, is ſtrictly legal, when the proclamation does not contravene the ancient laws, or tend to eſtabliſh new ones; but only to enforce the execution of ſuch laws as are already in being, in ſuch manner as the King ſhall judge neceſſary (*c*).

This, whether legal or not, is a detention within the policy.

But it is needleſs, in this place, to enlarge upon the right of our own ſovereign, or that of any other, to lay embargoes. For whether an embargo be legally or illegally laid, the injury to the owner, by the detention of his ſhip or goods, is the ſame; and the inſurer is equally liable for the loſs occaſioned by it.

The word *people* in the policy means *a* people, or nation, not a mob.

By the word *people* in the policy is not to be underſtood any promiſcuous or lawleſs rabble that may be guilty of attacking or detaining a ſhip: The following caſe will ſhew that it means *a* people; that is, a nation in its collective and political capacity.

Neſbitt v. *Lushington*, 4 T. R. 783.

A cargo of corn and coals was inſured from *Yarmouth* to *Sligo*, in *Ireland*.—The firſt count of the declaration, in deſcribing the loſs, ſtated that the ſhip, by ſtreſs of weather, was forced into *Elly Harbour*; where ſhe was, with force

A ſhip is forcibly ſeized by a tumultuous rabble:—This is a loſs by pirates, but not by detention of a people.

(*a*) Per Lord Commiſſioner *Hutchins*, 2 *Vern.* 176.—(*b*) Vid. *Salducci* v. *Johnſon*, ſup. 387. —(*c*) 3 Inſt. 162. 4 Mod. 177. 179. 1 *Bl.* Com. 270.

&c. and

and violence, attacked, boarded, arreſted, and detained, *by people to the plaintiff unknown*; by reaſon whereof the corn was wholly loſt. In the ſecond count it was ſtated that the ſhip being in *Elly Harbour*, was with force and violence attacked and boarded, ſeized and taken, by certain *pirates*, to the plaintiff unknown, whereby the corn was wholly loſt.—The policy was in the uſual form.—It appeared that the ſhip was forced by ſtreſs of weather into *Elly Harbour*; and there happening to be a ſcarcity of corn there at the time, the people came on board the ſhip in a tumultuous manner, and would not leave her 'till they had forced the captain to ſell all the corn at a certain price, except 10 tons which was ſpoiled by the ſtranding and thrown overboard. The ſhip afterwards arrived at her deſtined port, with the coals. The court determined that this was a capture by pirates, and not a loſs within the meaning of the words arreſts, &c. of kings, princes, and *people*.—Lord *Kenyon* ſaid the word *people* meant *the ruling power of the country*. Mr. Juſtice *Buller* ſaid it meant the *ſupreme power of the country*, whatever that might be. This, he ſaid, appeared by another part of the policy; for where the wrongful acts of *individuals* are mentioned, they are deſcribed by the names of *pirates*, rogues, thieves. Then, having ſpecified all the *individuals* againſt whoſe acts the inſurance is made, it ſpecifies thoſe occaſioned by the acts of kings, princes, and *people* of what nation, condition, or quality ſoever; which muſt apply to "nations," in their collective capacity (*a*).

By the *French* law, where a ſhip has been arreſted in time of peace, as there is reaſon to hope, in ſuch caſe,

An arreſt by the authority of the *Britiſh* government is within the policy.

(*a*) *Roccus*, (h. t. n. 54.), in the following paſſage, ſeems to interpret the uſual words of the policy in a larger ſenſe than that to which they are here reſtricted:—*Si merces captæ a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut a populo* aut ab aliâ quacunque perſonâ, *per vim, abſque pretii ſolutione, tenentur aſſecuratores ſolvere æſtimationem dominis mercium, factâ prius per dominos mercium ceſſione ad beneficium aſſecuratorum, pro recuperandis illis mercibus, vel pretio ipſorum a capientibus.*

that

that ſhe will ſoon be ſet at liberty again, ſuch an arreſt is not reputed the ſpecies of loſs that will at once juſtify an immediate abandonment; but the owners muſt wait till the expiration of a certain time, regulated by the ordinance of the marine, which, for an arreſt in *Europe*, is ſix months from the time notice of ſuch arreſt is given to the underwriters (*a*). —This regulation is founded on a ſacrifice of the intereſts of commerce to the pleaſure of the government. In *England* the rule is more juſt; for there, from the moment of a capture or arreſt, the owners are conſidered as having loſt their power over the ſhip and cargo, and are deprived of the free diſpoſal of them; becauſe, in the opinion of the merchant, his right of diſpoſal being ſuſpended or rendered uncertain, is equivalent to a total deprivation: It is therefore unreaſonable to oblige the inſured to wait the event of a capture, detention, or embargo (*b*).

A ſuſpenſion of the power of diſpoſal is a total loſs.

Therefore, if a *Britiſh* ſhip be arreſted or ſeized by the authority of the *Britiſh* government, from ſtate neceſſity; this ſhall be a detention within the meaning of the policy, for which the inſurer is liable (*c*).

Green v. *Young*, at N. P. 2 Lord *Ray.* 640. *Salk.* 444.

As, where a ſhip was inſured, 'from her arrival at —— 'in *Jamaica*, and during her voyage to *London*:'—An embargo was laid on the ſhip by the government, who afterwards ſeized her, and converted her into a fire ſhip, and offered to pay the owners.—The queſtion was whether this would excuſe the inſurers? Lord C. J. *Holt* ſeemed to be of opinion that it would not; and that this was within the words *detention of princes*, &c.: But he gave no abſolute opinion, becauſe the cauſe was referred.

A *Britiſh* ſhip is ſeized at *Jamaica*, and converted into a fire-ſhip by the government there: It ſeems the inſurer is liable.

So, if a ſhip be inſured "*at and from*" a given port, a detention by public authority, in that port, is a detention within the words of the policy. For the words of the policy being large enough to cover this riſk, nothing

If a ſhip, inſured *at and from* a port be arreſted *in* that port, this is an arreſt within the policy.

(*a*) *Pothier*, h. t. n. 56.——(*b*) Vid. Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 683. inf. ch. 13. § 1.——(*c*) Vid. *Emerig.* tom. 1. p. 541. *Ord. de la mar.* h. t. 52. and *Valin*, tom. 2. p. 134.

but

but ſome expreſs law or uſage to the contrary can exempt the inſurer (*a*).

Thus:—An inſurance was made on three ſhips, the *Adelaide*, the *Adéle*, and the *Victor*, their ſtores, &c.: Upon two of them, 'At *and from* L'Orient;' and upon the third, 'At, and from, and after, her arrival 'at *L'Orient*;' and upon all of them, 'To all ports, ſeas, and 'places whatſoever beyond, and on this ſide, the *Cape* 'of *Good Hope* and *Cape Horn*, on the ſouthern whale 'and ſeal fiſhery and trade, and until their arrival back 'at *L'Orient*.'—An action being brought on this policy, the loſs was ſtated in the declaration to have happened by the ſhips, their ſtores, and proviſions, being, by the authority of certain perſons exerciſing the powers of government in *France*, at *Port Louis* with reſpect to one, and at *L'Orient* with reſpect to the two others, *arreſted and reſtrained* from further proſecuting their voyages.—The

Retch v. *Edie*, 6 T. R. 425, ſup. 44.

A neutral ſhip and ſtores are inſured *at and from* an enemy's port, and an embargo is there laid on by the enemy. This is an arreſt of princes.—And if the embargo continue, the inſured may abandon and recover as for a total loſs.

(*a*) Some doubt ſeems to have been entertained on this point. *Roccus*, n. 65. ſays, "*Regis et principis factum connumeratur inter caſus fortuitos; ideo, ſi rex et princeps retineant navem oneratam frumenta aſportare ad locum deſtinatum, tenentur aſſecuratores.*" This paſſage, and that which precedes it, plainly ſhew that the author meant a detention by the power under whoſe authority the ſhip was to ſail. *Le Guidon*, c. 7. § 1. treating of abandonment, ſays, that the inſured may abandon, "*quand il advient du tout ou de partie, ou bien avarie qui excede ou endommage la moitié de la marchandiſe*, quand il y a priſe d'amis ou d'ennemis, *arrêt de prince*, &c." The ord. of 1684. h. t. art. 52. contains theſe words. "*Si le vaiſſeau étoit arrêté en vertus de nos ordres dans un des ports de notre royaume*, avant le voyage commencé, *les aſſurés ne pourront, á cauſe de l'arrêt, faire l'abandon de leurs éffets aux aſſureurs.*" *Valin*, commenting upon this article, (vol. 2. p. 134). diſtinguiſhes the arreſt of a foreign prince, from that made by order of the King of *France*; he alſo diſtinguiſhes an arreſt in the port of loading, from an arreſt in any other port of *France*, where the ſhip happens to put in; and he ſays that, only in the latter caſe, an arreſt by the King is a ground to abandon. But *Pothier*, (h. t. n. 59). and after him, *Emerigon* (vol. 1. p. 541.) reject

The *Adelaide* ſailed from *L'Orient* on the voyage inſured, but was obliged to put back by ſtreſs of weather, into *Port Louis*, and on the 5th of *February* 1793, while ſhe lay there, the *Adèle* and *Victor* were preparing for their voyages, and before the neceſſary paſſports and clearances could be obtained, an embargo was laid on all veſſels in thoſe ports. The *Adelaide* was brought back to *L'Orient*, the periſhable ſtores of all three ſhips were ſold, and the ſhips themſelves, with the reſt of the ſtores, remained at *L'Orient* under the embargo, which ſtill continued on all ſhips deſtined for long voyages. The *Adèle* and *Victor* had entered outward upon their reſpective voyages, when the embargo came; and that alone prevented them from ſailing. Notice of abandonment was given to the underwriters on the 27th of *February* 1793, and a total loſs claimed, and the ſame repeated in *Auguſt* following. The plaintiff, who then reſided in *England*, was a ſubject of the United States of *America*, and formerly reſided ſeveral

---

reject theſe diſtinctions, and maintain that the words, "*avant le voyage commencé*," mean before the *riſk* is commenced; and that if the riſk be commenced before the arreſt, the inſured may abandon, upon an arreſt even in the port of loading. *Le Guidon*, however, (ch. 9. art. 6). contains theſe words: "*Si le prince arrêſte le navire, comme s'il s'en vouloit ſervir; s'il avoit affaire de portion ou de toute la marchandiſe; s'il ne veut permettre aux navires de ſortir qu'en flotte, ou rédoublement d'équipage, ou s'il prévoyoit à plus grand danger les arreſtans pour quelque temps, l'aſſureur n'eſt en aucune indemnité quand telle choſe avient dedans le même port, pour ce que ce ſont* des dangers de la terre, *procedans du vouloir du prince.*"—Upon this paſſage of *Le Guidon*, *Valin* (ubi ſup) obſerves, that whatever may be the King's motive for ſtopping the departure of a ſhip, the inſurer has no right to abandon, but muſt wait till the king has withdrawn his orders, and it may be conſidered as one of the extraordinary and unforeſeen events by which a voyage may be prolonged beyond its uſual time. Lord *Mansfield*, in *Goſs* v. *Withers*, 2 *Bur.* 696. ſeems to have adopted the doctrine as laid down by *Roccus*, and followed by *Pothier* and *Emerigon*; namely, that the inſured may abandon in the caſe of a mere arreſt, or an embargo by any prince. Vid. infra, ch. 13.

years

years in *London*, but for ſome years previous to the inſurances in queſtion, had dwelt at *L'Orient*, and was jointly concerned in the Southern whale fiſhery with Mr. *Berard* a native of *France*, reſident at *L'Orient*, and whoſe intereſt was ſeparately inſured.—On the trial of the cauſe a ſpecial caſe, ſtating the above facts, was reſerved for the opinion of the court, and it was contended on the part of the underwriters,—1ſt, That an embargo at the loading port to which the ſhip belonged, and where the inſured owed a temporary allegiance to the governing power, was not a riſk within the meaning of the policy, becauſe like ſea-worthineſs, it is a condition neceſſarily implied in contracts of inſurance, that the ſhip may legally ſail from the loading port. 2dly, That there was no loſs in regard to the ſubject-matter of the inſurance, which is on the ſhip, &c. 3dly, That the plaintiff had no right to abandon as for a total loſs, under the particular circumſtances of this caſe.—The court, however, determined in favour of the plaintiff on all theſe points.—As to the *firſt*, they held, that the terms of the policy were ſufficiently large to extend to this caſe; and that it was incumbent on the defendant to have ſhewn ſome caſe in which it was otherwiſe decided; but all the authorities, both *Engliſh* and foreign, were in favour of the plaintiff. That the plaintiff was not an alien enemy, but a native of *America*, then reſident in *England*, and therefore under no diſability to ſue in this caſe, and the conſequence of allowing this objection, would be to render it illegal to inſure the property of a neutral, in an enemy's port. As to the *ſecond* point, the court held that, as the inſurance was not only on the ſhip, but on the ſtores, proviſions, and fiſhing tackle, which were loſt to the plaintiff; and as the voyage was loſt in conſequence of the detention of the ſhips, this was a loſs within the policy, and a very different caſe from that of *Robertſon* v. *Ewer* (*a*), to which it had been compared.—Upon the laſt point, the court was of opinion, that the plaintiff had as much right to abandon in this caſe, as in the caſe of a capture by an

(*a*) 1 T. R, 127. inf. c. 16. § 5.

enemy; and for this the doctrine of Lord *Mansfield* in *Goſs* v. *Withers* (*a*) was much relied upon.

A ſeizure, after a ceſſation of hoſtilities, is an arreſt of princes.

If a ſhip be ſeized after a ceſſation of arms and preliminary articles of peace are ſigned, this ſhall not be deemed a capture, but only an arreſt of princes.

Spencer v. *Franco*, at N. P. *December* 1736, *Beawes* 4th edit. p. 316. (*b*).

As, where the plaintiff had cauſed himſelf to be inſured 'On the *Prince Frederick* from *Vera Cruz* to *London*, *intereſt or no intereſt*, free of average, and without bene-'fit of ſalvage.'—The ſhip was afterwards ſeized by order of the Viceroy of *Mexico*, and the *Spaniards*, having taken out the *South Sea* Company's arms, and made ſeveral alterations in her, turned her into a ſhip of war, and ſent her as commodore with a ſquadron of men of war to the *Havannah*, there being a war at that time between *England* and *Spain*; and *Gibraltar* was actually beſieged by the *Spaniards*.—In an action on the policy (*c*), the defendants proved the ſigning of the preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted that this ſeizure did not alter the property, and conſequently the defendants were not liable: For if the property were not altered, this inſurance, made by the plaintiff without intereſt, could not bind, as nothing came within the policy but a total loſs: And though there be thoſe general words, "*reſtraint, or detainment of princes.*" —Lord *Hardwicke* C. J. declared that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*; that as a war might begin by hoſtilities only, ſo it might end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the taking of the ſhip afterwards not to be a taking by enemies, unleſs the jury took the capture to begin from the time the *South Sea* arms were taken out,

An *Engliſh* ſhip is ſeized by the *Spaniards*, and converted by them into a ſhip of war: But it appearing that this was after a ceſſation of arms, and preliminary articles of peace ſigned, and the ſhip having been reſtored; this was held not to be a capture, but only a detention of princes.

(*a*) 2 *Bur.* 583. inf. c. 13. § 2.—(*b*) This caſe, which is found in the 4th edition of *Beawes* but not in the 5th, is ſo imperfectly reported that it cannot be much relied upon as an authority: Yet, being cited by Lord *Mansfield* in the caſe of *Hamilton* v. *Mendes*, 2 *Bur.* 1211, I thought it ought not to be paſſed unnoticed here——.(*c*) The plaintiff, it may be preſumed, declared only upon a loſs by *capture*.

which

which was before the preliminaries; that ſuppoſing the ſhip not taken by enemies, whether the detention for near a year was, in this ſort of policy, viz *intereſt or no intereſt*, a detention within the policy; or whether, in ſuch policies, the inſurers are ever liable, but in caſe of a total loſs; and if ſo, the ſhip being afterwards reſtored, he directed the jury to find for the defendants, which they accordingly did.

Sect. VI.

Of Loſs by Barratry.

Barratry defined.

BARRATRY, which is derived from the *Italian* verb *barratrare* to cheat (*a*), may be defined to be any act committed by the maſter or mariners, for an unlawful or fraudulent purpoſe, contrary to their duty to their owners, and whereby the owners ſuſtain an injury: As, by running away with the ſhip, wilfully carrying her out of the courſe of the voyage preſcribed by the owners, ſinking or deſerting her, embezzling the cargo, ſmuggling, or any other offence whereby the ſhip or cargo may be ſubjected to arreſt, detention, loſs, or forfeiture. Barratry, in ſhort, comprehends every fraud that may be committed by the maſter or mariners, to the detriment of the owners; and therefore, where the breach aſſigned in the declaration on a policy was, the loſs of the ſhip, "by the *fraud and negligence* of the maſter," it was determined that this was a ſufficient averment of a loſs by barratry (*b*).

Whether inſurance againſt barratry ought in all caſes to be permitted.

At *Amſterdam*, *Hamburgh*, *Middleburgh*, and ſome other maritime towns, inſurers are, *by poſitive law*, made reſponſible for the barratry of the maſter and mariners (*c*). At *Rotterdam* the owners of ſhips are prohibited from in-

(*a*) Its meaning, according to *Dufreſne*, (Gloſ. verb. *Barratria*) is, "*fraus et dolus, qui fit in contractibus et venditionibus.*" ——(*b*) R. *Knight* v. *Cambridge*, 1 *Str.* 581. 2 Lord *Ray.* 1349, inf. ch. 16, § 2.——(*c*) 2 *Mag.* 73, 130, 215.

ſuring againſt the barratry of the maſter whom they themſelves appoint. But they are permitted to inſure againſt his neglect, againſt the barratry of the ſailors, and of ſuch maſter as may ſucceed to the command in foreign parts without their knowledge, upon the deceaſe or abſence of the maſter originally appointed (*a*).

Lord *Mansfield* ſeems to have thought it extraordinary that barratry ſhould ever have crept into inſurances, and ſtill more that it ſhould have continued in them ſo long; "thus," ſays his lordſhip, "making the underwriter become inſurer of the conduct of the captain whom he does not appoint, and cannot diſmiſs, to the owners who can do either" (*b*).

Roccus (*c*) holds that the inſurer cannot be made liable for barratry, if the inſured be the owner of the ſhip; but if he only *charter* the ſhip, he may inſure againſt barratry; becauſe, in that caſe, the owner of the ſhip appoints the maſter. But where the owner of the goods appoints the maſter, it is holden that he cannot be inſured againſt the barratry of ſuch maſter (*d*).

In *France* the inſurer was formerly anſwerable, *ipſo jure*, for the barratry of the maſter (*e*). But, by the ordinance of the marine (*f*), this liability is confined to caſes, where the policy expreſsly includes barratry; and *Emerigon* (*g*) even inſiſts that the owner of the ſhip cannot be inſured againſt barratry of the maſter, becauſe he is himſelf anſwerable, according to the rule of the *Roman* law (*h*), for the conduct of the maſter whom he employs; and if the owner be himſelf anſwerable to third perſons

---

(*a*) Vid. *Roccus*, n. 27, *Emerig.* tom. 1, p. 370 —— (*b*) 1 T. R. 330.——(*c*) h. t. n. 44.—— (*d*) *Quando navarchus poſitus eſt à domino mercium, tunc aſſecuratus ſibi debet imputare quod talem præpoſitum elegerit et aſſecurator non tenetur. Caſaregis*, diſ. 10, n. 14; diſ. 1. n. 75.——(*e*) Vid. *Le Guidon*, ch. 5, art. 6, ch. 9, art. 8, 12.——(*f*) h. t. art. 28. — (*g*) Vol. 1, p. 369.— (*h*) *Omnia facta magiſtri debet præſtare qui eum præpoſuit. ff.* l. 1, § 5, *de exercit.* act. *Ex delicto cujuſvis eorum qui navis navigandæ cauſâ in nave ſunt datur actio in exercitorem. id.* § 2.

for

for the barratry of the maſter, he cannot, *as inſured*, throw this burthen on the inſurer who would have an immediate remedy againſt him, *as owner*, to recover back the ſame loſs; a circuity of action which would be abſurd.

Upon the ſame principle *Emerigon* alſo holds that if the captain be commiſſioned to diſpoſe of an adventure on board, the inſurer of ſuch adventure ſhall not be anſwerable for the loſs of it, occaſioned by the fault of the captain; for this would be, to make the inſurer anſwerable to the inſured for the faults of his own agent (*a*).

But the objections to the policy of permitting inſurances againſt barratry, in the caſe of the *owner of the ſhip*, however well founded, do not apply to the caſe of an inſurance of goods in a *general ſhip*, which carries the goods of every man who chuſes to put them on board, or of a *chartered ſhip*, hired to carry the goods of the affreighter; for, in either caſe, the owner of the goods does not appoint the maſter, nor has he any control over him or the ſhip. It is probable that caſes like this firſt gave birth to the practice of inſuring againſt barratry; and that this, in proceſs of time, was indiſcriminately introduced into all policies.

But even in the caſe of a *particular ſhip* freighted entirely by a ſingle perſon, it may in general be preſumed that if the inſurer do not know the maſter, or at leaſt his character, it is his own fault, as every policy ſpecifies the maſter; but then it is generally provided that any other perſon, at the election of the inſured, may go as maſter; and by permitting this clauſe to ſtand in the policy, the inſurer waves all perſonal knowledge of the maſter, and therefore no objection can fairly be made of the want of ſuch knowledge (*b*).

And though barratry cannot properly be called a peril of the ſea, becauſe it does not ariſe *ex marine tempeſtatis diſcrimine*, yet it is a riſk, and a very great one, incident to ſea voyages; becauſe merchants are obliged to confide

(*a*) *Emerig.* tom. 1, p. 370.—(*b*) Vid. *Roccus*, h. t. n. 27. *Cowp.* 153. Vid. ſup. 312.

their ſhips and merchandize to the care of mariners, who may ſometimes ſo far forget their duty, as to betray the important truſt repoſed in them. Unleſs, therefore, the merchant could be protected by inſuring againſt this riſk, few men of ſmall capitals would expoſe themſelves to it. For this reaſon the law, with us, permits even the owner of the ſhip to be inſured againſt the miſconduct of the captain and crew, though they are his own agents, and the perſons of his own choice.

The captain may be inſured againſt the barratry of the ſailors.

If the captain be inſured, no agreement on the part of the inſurers can make them liable for barratry committed by himſelf (*a*); but they may be liable, in ſuch caſe, for the barratry of the ſailors, in which he has no part (*b*).

Still, however, it muſt be owned that caſes ſometimes occur which tempt one to think that it might, perhaps, be the wiſeſt policy to impoſe ſome reſtraint upon unqualified inſurances by *owners of ſhips*, againſt this ſpecies of riſk. It would at leaſt have the effect of making them more circumſpect in the choice of the perſons to whom they conſide ſo great a charge.

What ſhall be deemed barratry.

Valin (*c*), *Pothier* (*d*), and *Emerigon* (*e*), adopting the doctrine of *Le Guidon* (*f*), hold that barratry comprehends every fault, either of the maſter or mariners, by which a loſs is occaſioned, whether ariſing from fraud, negligence, unſkilfulneſs, or mere imprudence; and in this ſenſe it ſeems to be underſtood in the *French* ordinance of the marine (*g*).

But with us, no fault of the maſter or mariners amounts to barratry, unleſs it proceed from a fraudulent purpoſe in the maſter or mariners at the time (*h*).

A deviation not proceeding from fraud is not barratry.

Therefore if the maſter, from *ignorance*, *unſkilfulneſs*, or from any motive which is not *fraudulent*, depart from

---

(*a*) *Le Guidon*, ch. 15, art. 4; *Valin*, h. t. art. 27, p. 75; *Pothier*, h. t. n. 65.——(*b*) *Emerig.* tom. 1, p. 371.——(*c*) On art. 28, h. t. tom. 1, p. 79.——(*d*) h. t. n. 65.—— (*e*) tom. 2, p. 366.—(*f*) Ch. 5, art. 6, ch. 9, art. 1, 8.——(*g*) h. t. art. 28. ——(*h*) *Non omnis navarci culpa eſt barataria, ſed ſolum tunc ea dicitur, quando committitur cum præexiſtenti ejus machinatione et dolo præordinato ad caſum. Caſaregis*, diſ. 1, n. 77,

the

the proper courſe of the voyage; this will be a deviation which may avoid the policy, but it will not amount to barratry.

Thus:—Goods were inſured from *London* to *Jamaica*, and it appeared that the captain's inſtructions were to proceed immediately to *Jamaica*: But after the ſhip had cleared the *Channel*, ſhe was carried by currents and other cauſes, out of her reckoning, till ſhe was found to be between the *Grand Canary* and *Teneriffe*. From this ſituation her direct courſe to *Jamaica* was to the ſouth-weſt, inſtead of which, the captain bore up from *Santa Cruz*, to the north-weſt about 30 miles, where ſhe came to an anchor. There, an embargo was laid upon her; ſoon after which, news arrived of war having been declared between *Spain* and *Great Britain*, and the ſhip and cargo were ſeized and condemned as prize.—In an action on the policy, the declaration contained two counts; one for a loſs by *capture*, the other for a loſs by *barratry*. And it was contended on the part of the plaintiff, that he was neceſſarily intitled to recover on one count or the other. On the firſt, if there was no deviation; or, admitting that the ſhip's going to *Santa Cruz* inſtead of proceeding to *Jamaica*, after the captain knew with certainty where he was, was a deviation, ſtill it was a wilful deviation by the captain, againſt his inſtructions, merely to procure a temporary refreſhment, and no benefit to the owners, and therefore an act of barratry.—Lord *Kenyon*, who tried the cauſe, ſaid, that it could not be barratry, without a fraudulent purpoſe in the captain at the time; and with that direction he left it to the jury, who found, "that "the captain's going to *Santa Cruz* was a deviation, and "was owing either to ignorance or ſomething elſe, *but* "*that it was not fraudulent*;" and they accordingly found for the defendants.—Upon a motion for a new trial, the court were clearly of opinion that there muſt be *fraud* to conſtitute barratry; and as the jury had expreſsly negatived fraud, there could be no barratry.—Mr. Juſtice *Lawrence* ſaid he knew of no caſe in which it is ſaid that the act of the captain is barratry, merely becauſe it is againſt the intereſt of the owners; it muſt be done with a *criminal intent*: That, in this caſe, the jury having negatived

Phyn. v. Roy. Ex. Aſſur. 7 T.R. 505.

In a voyage from *London* to *Jamaica*, the captain loſes his reckoning; and when he diſcovers his ſituation, inſtead of ſteering directly to *Jamaica*, bears up for an iſland out of that courſe:—This is a deviation, but being without any fraudulent intention, is not *barratry*.

tived fraud, had negatived criminality in the captain; and therefore this was not a barratrous deviation.

Whether barratry may be committed by the ſeamen without the participation, or againſt the will, of the captain.

In *France*, if by the policy the inſured be protected againſt the barratry of the *maſter*, the underwriters are anſwerable for the miſconduct of the *mariners* alſo; becauſe the word maſter (*patron*) comprehends all the perſons on board who are in the ſhip's pay (*a*). Our policies are more explicit, and diſtinctly ſpecify barratry of the maſter and *mariners*. I ſhould conceive, therefore, that with us, as in *France*, the mariners may commit barratry, without the concurrence of the maſter, or againſt his will. In the following caſe, however, Lord C. J. *Lee*, at *niſi prius* held, that a deviation to which the maſter was compelled by a daring act of violence and diſobedience on the part of the ſeamen, did not amount to barratry, becauſe the ſhip was not actually *run away with in order to defraud the owners.*

Elton v. Brogden, 2 *Str* 1264. Sup. 212

A letter of marque has orders, in caſe ſhe takes a prize, to ſend it home, and proceed on her voyage; but the maſter was compelled by the ſailors to return back with the prize:—This is not barratry.

That was the caſe of a letter of marque, inſured for a voyage 'from *Briſtol* to *Newfoundland*.'—She ſailed with expreſs orders that, if ſhe ſhould take any prize, ſhe ſhould nevertheleſs proceed on her voyage, and that ſome hands ſhould be put on board the prize, and ſent with it to *Briſtol*.—A prize was taken in the courſe of the voyage, and the captain ordered ſome of the crew to carry the prize to *Briſtol*, while he proceeded on his voyage: But the crew oppoſed him, and inſiſted on his going back, though he acquainted them with his orders; and he was forced to ſubmit, and on his return his own ſhip was taken.—The underwriters inſiſted that this was a deviation which diſcharged them. But the court and jury held, that this was occaſioned by the force upon the maſter, which he could not reſiſt; and that it therefore fell within the excuſe of neceſſity, which had always been allowed. The plaintiff's counſel would have made barratry of it;

(*a*) *Les aſſureurs ne reſpondent pas des méfaits des mariniers a moins que par la police ils ne ſoient chargés de la baratterie du patron. Le mot patron comprehend ici tous ceux qui ſont aux gages du navire. Emerig. t.* 1. *p.* 381, 2. *Vid. Valin, tom.* 2. *p.* 3.

but

but lord chief juſtice *Lee* thought that it did not amount to barratry, as the ſhip was not run away with *in order to defraud the owners:* Neither was it a caſe of wilful deviation, but of deviation occaſioned by the force upon the maſter which he could not reſiſt, and therefore excuſed by the neceſſity. The inſurers were therefore held to be anſwerable, and the plaintiff had a verdict as for a loſs by capture (*a*).

The learned judge who tried this cauſe, and who was in general a maſter of all the learning of his time on the ſubject of inſurance, ſeems to have thought that nothing ſhort of running away with the ſhip, with intent to defraud the owners, amounted to barratry. What the ſeamen did in that caſe was but one degree ſhort of ſuch a crime. In the following caſe, which we have already had occaſion to mention, the conduct of the maſter was held to be barratry, though certainly much more venial than that of the ſailors in the above caſe.

A ſhip was chartered for a voyage from *Liverpool* to the *Bahamas* and back, and on her return from the *Weſt Indies*, letters of marque were taken on board, merely to entice ſeamen to enter, but without the neceſſary documents to give them validity, *and without any intention of cruiſing in queſt of prizes;* and it was a part of his written inſtructions, before he ſailed, to proceed to *Liverpool* with all expedition. A few days after the ſhip ſailed, however, the captain, with the concurrence of the majority of the ſeamen, determined to cruiſe for prizes; and he ſoon fell in with an *American* whom he plundered and

Moſs v. *Byrom*, 6 T. R. 379. Sup. 283.

The maſter, without the proper authority, and contrary to his orders, cruiſes in queſt of prize, this is barratry, though done for the benefit of the owners.

(*a*) In an appeal from the *Eaſt Indies*, in a cauſe of *De Friſe* v. *Stephens* at the Cockpit, 1ſt *July* 1800, Sir *R. P. Arden*, then Maſter of the Rolls, obſerving upon this caſe of *Elton* v. *Brogden*, ſaid, he thought it muſt be ill reported in *Strange*; for, upon the facts ſtated, there could be no doubt but that the *mariners* had committed barratry, and that he was therefore inclined to think, as Lord *Mansfield* appeared to have done in commenting on this caſe in that of *Vallejo* v. *Wheeler*, that the policy muſt have been ſpecial, probably not including barratry of the mariners.

afterwards diſcharged. He then cruiſed for ſome days out of the courſe of the voyage, and captured a ſhip of the enemy which he ſent to *Bermudas*, where he followed her himſelf, and there libelled her as prize in the court of admiralty, in the name of himſelf and *his owners*. But during his ſtay there his ſhip was ſtranded, and the cargo loſt. He directed that the cruiſing ſhould not be mentioned in the log-book.—In an action to recover as for a loſs by barratry, it was contended on the part of the underwriters, that this could not be barratry, in as much as the act of the captain, however reprehenſible in other reſpects, was done with a view to benefit, not to prejudice, his owners.—But the court held this to be barratry; and that the ſtopping and plundering the *American* ſhip was of itſelf an act of barratry in the maſter, independent of his taking the prize, this being contrary to his duty to his owners, and to their prejudice; becauſe, by the charter-party, they had ſtipulated that the ſhip ſhould ſail directly to *Liverpool*, and they were therefore liable for any damage that might happen in conſequence of any wilful deviation.—Mr. Juſtice *Lawrence*, in delivering his opinion, ſaid, "It has been holden that whatever is done by the captain, to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners. And though he might conceive that what he did was for the benefit of the owners; yet, if he acted contrary to his duty to them, it was barratry."

Any illegal act, done by the maſter, without the authority of the owners, and to their detriment, is barratry, though done with a view of promoting their intereſt.

In the following caſe, which was determined in the Court of *King's Bench* upon great conſideration, and in which Lord *Ellenborough*, in a very able judgment, took a maſterly view of all the learning and authorities on this ſubject, it was determined that any illegal act done by the maſter, without the authority of the owners, and to their detriment, is barratry, though it be not done with intent to injure them, or to benefit himſelf, and even though it be done with a view of promoting their intereſt.

Earl v. *Rowcroft*, 8 *Eaſt* 126.

The maſter of an *African* ſlave ſhip, ſails to an enemy's ſettlement on the coaſt

The ſhip *Annabella* was inſured from *Liverpool* upon an *African* voyage, and, in an action on the policy to recover a loſs by barratry, it appeared that the maſter, who was alſo ſupercargo, upon his arrival at *Cape Coaſt Caſtle*, a *Britiſh* ſettlement on the coaſt of *Africa*, began

to

to trade there; but, after a couple of days, receiving intelligence that he could barter his goods for ſlaves more advantageouſly and expeditiouſly at *Elmina*, a *Dutch* fort about ſeven miles to windward, he proceeded thither and there exchanged his goods, conſiſting, amongſt other things, of muſkets and gunpowder, for ſlaves, *Holland* being at that time at war with *Great Britain*, and he having letters of marque on board againſt the *French* and *Dutch*. After taking on board a number of ſlaves, the maſter, who was then on ſhore at *Elmina*, hearing that an *Engliſh* frigate was in ſight, ſent a note on board the *Annabella*, directing her to ſail immediately to *Cape Coaſt*; "*to prevent miſchief*," as he expreſſed himſelf; but, in her way thither, ſhe was purſued and ſeized by the *Engliſh* frigate, and ſent to *Jamaica*, where ſhe was condemned as prize, for having traded with the enemy (*a*). It further appeared, that it had been uſual to keep up a trading intercourſe between the *Engliſh* and *Dutch* ſettlements on this part of the coaſt, even in times of war between the mother countries, and that the maſter's object in going to *Elmina* was to complete his cargo as cheaply and expeditiouſly as he could; that when the ſhip was about to go to *Elmina* the ſurgeon aſked the maſter if there was no impropriety in going thither, to which he anſwered that they ſhould be ſoon off again, and nobody would know it; and it alſo appeared that, beſides his uſual wages, he had a commiſſion on the purchaſe and ſales, which he received at the end of each voyage.—The Court determined that

for the purpoſe of trading to more advantage than he could at a *Britiſh* ſettlement. For this his ſhip is ſeized by a *Britiſh* frigate, and confiſcated: —This trading was barratry.

(*a*) As to the illegality of trading with the enemy, vid. ſup. ch. 3. § 4. And with reſpect to the legality of capture and confiſcation for trading with the enemy, without the king's licence, ſee the caſe of the *Hoop*, 1 *Rob.* Adm. Rep. 196, with the authorities there cited, and the caſe of the *Olin*, id. 248; ſee alſo 2 *Rob.* Adm. Rep. 166, and the caſe of the *Coſmopolite*, 4 *Rob.* Adm. Rep. 10. And a trading by the ſubjects of an ally in the war, has been holden illegal, and a ground of ſeizure and confiſcation in our Courts of Admiralty. See the caſe of the *Nayade*, 4 *Rob.* Adm. Rep. 251. See 5 *Rob.* Adm. Rep. 254, 256.

this trading with the enemy by the maſter, without the authority of the owners, though intended principally for their benefit, being in contravention of his duty to them, and ſubjecting their property to confiſcation, was barratry.—Lord *Ellenborough* concludes his very able judgment by laying it down as clear law "That a breach of duty by the maſter, in reſpect to his owners, with a fraudulent or criminal intent, or *ex maleficio*, is barratry; that it makes no difference whether this act of the maſter be induced by motives of advantage to himſelf, malice to the owner, or a diſregard of thoſe laws which it was his duty to obey; and that it is not for him to judge or ſuppoſe, in caſes not intruſted to his diſcretion, that he is not breaking the truſt repoſed in him, when he endeavours to advance the intereſt of his owners by means which the law forbids."

Barratry can only be committed against the owners, and therefore not *with their conſent.*

Barratry can only be committed by the maſter and mariners by ſome act contrary to their duty, in the relation in which they ſtand to the owners of the ſhip. It is therefore an offence againſt them, and conſequently an owner himſelf cannot commit barratry. He may, by his fraudulent conduct, make himſelf liable to the owner of the goods on board, but not *for barratry*. Neither can barratry be committed againſt the owner, *with his conſent*; for though he may be liable for any loſs or damage occaſioned by the miſconduct of the maſter to which he conſents, yet this is not barratry. Nothing is more clear than that a man can never ſet up as a crime an act done by his own direction or conſent. Theſe points will be found fully eſtabliſhed in the two following caſes.

Stamma v. *Brown*, 2 *Str.* 1173.

A ſhip is engaged to carry goods ſtraight to *Marſeilles*; but inſtead of going thither direct, ſhe goes firſt to *Genoa* and *Leghorn*: This being done by the authority of the owner, is not barratry.

In the firſt of theſe, it appeared that a ſhip being advertized to go to *Marſeilles*, goods were ſhipped on board her, and the maſter ſigned a bill of lading, whereby he undertook to to go ſtraight to that place, and the goods were inſured, 'from *Falmouth*,' (where they were to be taken on board), 'to *Marſeilles*.' Before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Legborn*, and *Naples*, and the plaintiff's

plaintiff's agent was told that it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go directly to *Marſeilles*; and he would not conſent to let her paſs by *Marſeilles* or alter his inſurance.—The ſhip, however, did paſs by *Marſeilles*; and after delivering her cargo at the other ports, ſet out on her return to *Marſeilles* with the plaintiff's goods; but, in her voyage thither, was blown up in an engagement with a *Spaniſh* ſhip of war. The plaintiff declared as for a loſs by the barratry of the maſter.—Lord C. J. *Lee* told the jury that this voyage, being againſt the expreſs agreement to proceed ſtraight to *Marſeilles*, ſeemed to be more than a common deviation, as it was a formed deſign to deceive the plaintiff; and compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, which had been holden to be barratry. The jury, after ſtaying out ſome time, returned and aſked the Chief Juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt, for the benefit of his owners, that would be barratry; and the Chief Juſtice anſwering, No, they found for the defendant.—On a motion for a new trial, the court after argument, were unanimouſly of opinion that the verdict was right: For the maſter had acted conſiſtently with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance; and to make it barratry, there muſt be ſomething of a criminal nature, as well as a breach of the contract, but here, the breach being aſſigned only on the *barratry*, was not ſupported by the evidence.—Mr. Juſtice *Lawrence*, in delivering his judgment in the caſe of *Plyn* v. *Roy. Ex. Aſſur.* (*a*) ſays that, in this caſe, of which

(*a*) 7 T. R. 508. See ſome further extracts of this note, and alſo of Mr. *Ford*'s note of this caſe of *Stamma* v. *Brown*, 8 *Eaſt* 135-6.

he

he had a manuſcript note, Lord C. J. *Lee*, in defining barratry, ſaid, "Barratry muſt be ſome breach of truſt in the maſter, *ex maleficio*."

Nutt v. *Bourdieu*, 1 T.R. 323.

After bills of lading are delivered to the owners of goods, the captain ſigns new ones, changing the deſtination of the ſhip; and the goods are diſpoſed of for the uſe of the owner of the ſhip, and in fraud of the owner of the goods:—This being done with the concurrence of the owner, is not barratry.

The other was the caſe of an inſurance effected on behalf of *Hague*, before he became bankrupt, on goods on board the *Rachette* from *London* to *Rochelle*. It appeared that the maſter, *by the inſtigation and direction of* Le Grand, *the owner of the ſhip, went with the ſhip and cargo to* Bourdeaux, *inſtead of* Rochelle, *where the cargo was ſold by the agent of* Le Grand: That a petition was preſented by the inſured to the admiralty of *Guienne*, ſtating that *Le Grand*, partner in a houſe at *Rochelle*, being in *London* with his ſhip, and in want of a cargo to return home, applied to *Hague*, who agreed to ſupply him with goods, which were loaded on board the ſhip, for account of *Le Grand*; that as *Hague* did not know the houſe of *Le Grand*, it was agreed between him, *Le Grand*, and the captain, that the bills of lading ſhould not be delivered to *Le Grand* but at *Rochelle*, after he ſhould have paid the amount to the agent of *Hague*, in good bills, and, in default, that the goods ſhould be received by *Hague*'s agent for his account free from freight &c.; that the captain accordingly delivered bills of lading to *Hague*, who forwarded them, together with the contract, to his agent at *Rochelle*, with orders to receive the goods on the arrival of the ſhip, or deliver them to *Le Grand* if he ſhould fulfil his agreement; that, upon the ſhip's arrival at the harbour of *Rochelle*, *Le Grand* went on ſhore, got ſecretly into the town, where, having conſulted with his partners how to elude the precautions taken by *Hague*, returned on board and got the captain fraudulently to ſign other bills of lading, by which he reſerved to himſelf the liberty of putting into *Rochelle* or *Bourdeaux*, and by means of the falſe bills of lading, and by the contrivance of *Le Grand*, the goods were there put into the hands of *Le Grand*'s agent; that *Hague*'s agent on hearing of this, applied to the houſe of *Le Grand*, who gave him bills for the whole amount, but which were afterwards diſhonoured; whereupon the agent attached the cargo in the hands of the ſeveral perſons who

who held it; that the houſe of *Le Grand* having delivered a falſe account to their creditors, a releaſe was granted them from all attachments and executions, confirmed by the parliament of *Paris*, with an injunction to all perſons arreſting their goods to reſtore them; that, in conſequence of this petition, the court of admiralty at *Bourdeaux* decreed *that the captain was guilty of barratry*, for having ſigned falſe bills of lading, in order to change the voyage, and carry away the goods, for which they condemned him to the galleys for life, and declared *Le Grand* to be an *accomplice in the ſaid barratry of the maſter*, and guilty of *robbery* in cauſing the ſhip to be brought into *Bourdeaux*, and condemned him to the galleys for five years, and laſtly, condemned the captain and *Le Grand* to pay the value of the goods, with the charges, &c.—The court were clearly of opinion that this could not be barratry, and that the plaintiff ought not to recover.—Lord *Mansfield* ſaid,—"The ſentence of the *French* court of admiralty, which declared the maſter and owners to have been guilty of barratry, is entirely out of the queſtion: For, though it was a moſt righteous judgment, yet it was no part of the conſideration of that court, what was meant by barratry in an *Engliſh* policy. Their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts; for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *Engliſh* court of juſtice. The point to be conſidered is, whether barratry, in the ſenſe in which it is uſed in our policies, can be committed againſt any but the owners of the ſhip. It is clear beyond contradiction that it could not; for barratry is ſomething contrary to the duty of the *maſter* and *mariners*, the very terms of which imply that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. An owner, therefore, cannot commit barratry. He may make himſelf liable by his fraudulent conduct to the owner of the goods, but not as for barratry.. And, beſides, barratry cannot be committed againſt the owner *with his conſent*: For though the owner may become

liable

liable for a civil loſs, by the miſbehaviour of the captain, if he conſented, yet that is not barratry. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner*, by the maſter or mariners."

If the ſame perſon be both owner and maſter he cannot commit barratry.

If the maſter of the ſhip be alſo the owner, he cannot commit barratry, becauſe he cannot commit a fraud againſt himſelf. And even where he has mortgaged the ſhip, and the legal title is in another, and he has only the equity of redemption, yet he is ſtill ſo far the owner, that he cannot commit barratry (*a*).

But a deviation without the knowledge of a general freighter, though with the conſent of the owners, is barratry.

It is not, indeed, againſt the perſon poſſeſſed of the mere legal title to a ſhip, that barratry may be committed; it may be committed againſt a general freighter, in reſpect of his temporary power over that ſhip during a given voyage; and a deviation for an illegal purpoſe, without his knowledge or conſent, will be barratry, though it be with the conſent of the original owner.

Vallejo v. Wheeler, Cowp. 143.

As where goods were inſured in the common form, 'From 'London to *Seville*, with liberty to touch at any ports or 'places, &c.'—In an action on the policy, the loſs was alledged different ways in the declaration; *firſt*, that the ſhip by ſtorms and perils of the ſea, was forced to go to *Dartmouth* to be repaired; and that afterwards a further loſs happened by ſtorms, &c.; *ſecondly*, that it happened by ſtorms, &c. in the voyage generally; and *thirdly*, by the *barratry of the maſter*.—At the trial it appeared, that the ſhip was put up as a general ſhip from *London* to *Seville*, and was let to freight by one *Willes* to *Darwin* (*b*); that it is the courſe for veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions; that this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*, and while ſhe lay there, all the other

(*a*) *Semb.* per Lord Chancellor *Hardwicke*, *Lewin* v. *Suaſſo*, *Poſt. Dig.* vol. 1, p. 147.—(*b*) Mr. *Cowper*'s report of this caſe ſtates *Darwin* to have chartered the ſhip to *Brown*, his captain. Mr. Juſtice *Buller* in 1 T. R. 330, ſays, that the error ſhould be corrected by ſtating that the ſhip was chartered by *Brown* to *Darwin*, and not by *Darwin* to *Brown*. But it appears by the ſubſequent part of the report, that *Willes* chartered the ſhip to *Darwin*.

ſhips

ſhips bound to the weſtward bore away, but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was out of the courſe of the voyage; that the captain went there for his own convenience, to take in brandy and wine on his own account, after which he intended to proceed to *Cornwall*; that the night after the ſhip quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*; that when ſhe was refitted, ſhe ſailed again, and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop and take in proviſions, but in her way thither, ſhe received further damage, and at her arrival was totally incapable of proceeding on the voyage; and that the goods inſured were much damaged. —It was attempted, on the part of the defendant, to prove that the voyage to *Guernſey* was on account of *Willes*, the owner of the ſhip, and that the goods taken on board there were his property: But this evidence went little farther than information and belief, except that, when the ſhip arrived at *Helford*, the wine was delivered into his cellar.—Mr. Juſtice *Aſhurſt*, who tried the cauſe, told the jury that, if the going to *Guernſey* was without the knowledge of *Darwin*, it was barratry; and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: And if they ſhould be of opinion that it was without the knowledge of *Darwin*, then, he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not (*a*). The jury found for the plaintiff, and ſaid they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.—Upon a motion for a new trial, two queſtions were made: *Firſt*, Whether the conduct of the maſter, in going to *Guernſey*, for

(*a*) There ſeems to be ſome error in this part of the report. The firſt part of the direction of the learned judge *takes it for granted* that *Darwin* was the owner. If ſo, it could not be material to enquire whether the deviation was with, or without, the knowledge of *Willes*. It would ſeem, from the finding of the jury, that it had been left to them to ſay which of the two was the owner.

the purpoſe, and under the circumſtances above ſtated, was barratry: Suppoſing this to be barratry, then *ſecondly*; whether, to entitle the plaintiff to recover, the loſs muſt not have happened during the continuance of the barratry, or have been occaſioned immediately by the act of barratry: Here the goods were not ſeized for ſmuggling, nor did the loſs happen till after the act of barratry.—The court, after two arguments, were unanimouſly of opinion that this was barratry.—They ſaid, that if a ſhip be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the ſhip would have the direction of her, and the hiring of the maſter and mariners; that though *Willes* was originally the owner, and not being the inſured here, every thing relating to him might be laid out of the caſe, and that the jury, therefore, did right in conſidering *Darwin* as owner *pro hac vice*; that *Darwin* being the freighter and owner of the goods on board, any fraud committed on the owner, muſt be committed on him; that the maſter had agreed to go on a voyage from *London* to *Seville*, and *Darwin* truſted he would ſet out immediately, inſtead of which, he went on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*, which was a cheat and a fraud on *Darwin*, and was therefore barratry; that barratry is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct in the maſter, by which the owners or *freighters* are injured; that whether the loſs happened in the act of barratry, that is, *during* the fraudulent voyage, or after, was immaterial, becauſe the voyage was equally altered even though there was no other iniquitous intent; independently of this, the judges ſeemed to think that the loſs, in the preſent caſe, was ſuſtained *in conſequence* of the alteration in the voyage; that the moment the ſhip was carried from her right courſe, it was barratry, and the loſs happened in conſequence; but that, ſuppoſing the loſs to have happened *afterwards*, the inſured, if not protected againſt the barratry of the maſter, would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and he could have no

remedy

remedy againſt the underwriters for a loſs in conſequence of a deviation.

Hence it would ſeem that, if barratry be once committed, every ſubſequent loſs or damage may be aſcribed to that cauſe; and that the underwriters are liable for it, as for a loſs by barratry.

It is ſufficient to prove that the maſter committed barratry, without ſhewing *negatively*, that he was not owner, &c.

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule, in queſtions of inſurance, that he who charges barratry, muſt ſubſtantiate it by concluſive evidence (*a*); yet, in the following caſe, it was determined that proof of the maſter's having carried the ſhip out of the regular courſe of the voyage, for fraudulent purpoſes of his own, is *primâ facie*, ſufficient to entitle the plaintiff to recover; without ſhewing, *negatively*, that he was not the owner, or that any other perſon was the owner, or that this was not done with the owner's conſent.

Roſs v. *Hunter*, 4 T. R. 33.

Goods are inſured from *Jamaica* to *New Orleans*, and the maſter anchors in the mouth of the *Miſſiſſipi*, goes up to that place in his boat for a fraudulent purpoſe, and on his return, ſtands away for the *Havannah*:—Proof of theſe facts is ſufficient evidence of barratry, without ſhewing negatively that he was not *owner* or *general freighter*.

Thus:—Goods were inſured on board the *Live Oak*, *Joſeph Rati* maſter, 'At and from *Jamaica* to *New Orleans*.'—In an action on the policy, there were two counts in the declaration; the firſt alledging a loſs by the barratry of the maſter; the ſecond by the perils of the ſea.—Upon the trial, it appeared, That the ſhip was put up as a general ſhip at *Jamaica*, that ſhe ſailed on the voyage inſured in *May* 1783; that the plaintiff, amongſt others, ſhipped the goods in queſtion, and in *June* following, arrived in the mouth of the *Miſſiſſipi*, which leads up to *New Orleans*, in *Spaniſh America*, at the diſtance of 35 leagues; that when the captain had got thus far, he dropped anchor, and went in his boat up the river to *New Orleans*, and, on his return, without carrying the ſhip to her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of; that he had a private adventure of negroes of his own on board, which there was reaſon for ſuppoſing he intended to diſpoſe of at *New Orleans*; but that, finding it difficult to do

(*a*) *Barataria crimen nunquam eſt præſumendum ſed concludentiſſimè probandum. Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99; diſc. 226, n. 6. Vid. *Emerig.* tom. 1, p. 372.

ſo

ſo, on account of an interdiction by the *Spaniſh* government againſt the importation of them there, he went to the *Havannah* in queſt of a market for them.—The defendants inſiſted that, upon the firſt count, there was no evidence to ſhew that the captain was guilty of barratry; for *non conſtat* that he was not himſelf the *owner* or *general freighter* of the ſhip; or if not, that he had acted contrary to the directions of the owner in going out of the original courſe; and that, as to the ſecond count, there was a clear deviation which diſcharged the underwriters.—Lord *Kenyon*, who tried the cauſe, was of of opinion that barratry was ſufficiently proved, and that therefore the plaintiff was intitled to recover on the firſt count, and the jury found accordingly.—Upon a motion for a new trial, the court were clearly of opinion that the evidence was ſufficient to ſupport the verdict. The ſhip was a general ſhip, of which *Rati* was proved to be *captain*, which is *primâ facie* evidence that he was not *owner*. There was no proof of his being owner; and if that fact were neceſſary to conſtitute the defence of the underwriter, the affirmative proof lay upon him. For the ſame reaſon, if *Rati* had been general freighter, that ought to have been proved by the defendant.—Mr. Juſtice *Buller* alſo held, that the very dropping of the anchor in the mouth of the *Miſſiſſipi*, being with a fraudulent view, was an act of barratry.

Even dropping anchor with a fraudulent view is an act of barratry.

If a ſhip be inſured for a term, *in any lawful trade*, and barratry be one of the riſks mentioned in the policy, the underwriters are anſwerable for the barratry of the maſter by ſmuggling; for *lawful trade* in the policy means the trade in which the ſhip ſhall be employed by the owners, and not any unlawful commerce in which the captain may be engaged without their concurrence.

Though the words '*in any lawful trade*' be inſerted in a policy, the inſurer is liable, if the captain commit barratry by *ſmuggling*.

As, where a ſhip was inſured for twelvemonths, '*in any lawful trade*, to commence on her ſailing from '*Sunderland*.'—The declaration alledged, that the ſhip ſailed *in a lawful trade* from *Sunderland*, and afterwards ſailed on a voyage from *Oſtend* to *Sunderland*, but put into the port of *Shields*, where the maſter, *in a barratrous and fraudulent manner, without the knowledge or conſent of the owner*, did fraudulently and barratrouſly, import from *Oſtend*,

Blankley v. *Winſtanley*, 3 T. R. 279.

Oſtend, a quantity of ſmuggled goods, whereby the ſhip became forfeited, and was ſeized.—To this the defendant demurred, and inſiſted that, as the inſurance only extended to loſſes which the ſhip might ſuſtain in a *lawful trade*; the underwriter could not be liable for any loſs occaſioned by an *unlawful trade*, whether it proceeded from the act of the maſter or owner; and that the barratry inſured againſt was ſuch as might happen in a lawful trade, as by deſerting, ſinking, or running away with, the ſhip.—But the court determined that if the owner conducted himſelf with propriety, he was entitled to be indemniſied againſt all the perils inſured againſt in the policy; and that the words "*any lawful trade*" in the policy meant the trade in which the ſhip was employed *by the owners*.

Every loſs muſt appear to be a direct and immediate conſequence of the cauſe to which it is aſcribed by the inſured. We have ſeen, however, in the caſe of *Vallejo* v. *Wheeler* (*a*), that whether the loſs happen during the act of barratry, or after it, is immaterial. Yet, if a loſs do not happen within the time preſcribed by the policy for the duration of the riſk, the inſurer will not be liable for it, though it be the undoubted conſequence of the barratry.

The inſurer will not be liable unleſs the loſs happen during the voyage, though barratry was committed before.

As where a ſhip was inſured from *Hamburgh* to *London*; and it appeared that, in the courſe of the voyage, the maſter committed barratry, by ſmuggling on his own account, on the *Engliſh* coaſt; that on the 1ſt of *September* 1785, the ſhip arrived at her moorings in the *Thames*, where ſhe remained in ſafety till the 27th, when ſhe was ſeized for the ſmuggling, and the owners, upon their petition, had leave to compound for a ſum of money.—Upon this caſe it was determined that though, by the exciſe laws, the forfeiture attaches the moment the offence is committed, and the ſhip may be ſeized at any time afterwards, and that the barratry was committed *during the voyage*; yet, that the underwriters were not liable for this loſs; for the law of inſurance would be left unſettled, if the liability of the inſurers were to be

Lockyer v. *Offley*, 1 T. R. 252; Sup. 174.

(*a*) Sup. 528.

 continued

continued for any other time than that preſcribed by the policy.

How barratry ſhall be puniſhed.

The offence of barratry, ſo miſchievous in itſelf, and ſo injurious to commerce, is puniſhable as a public offence, according to the degree of guilt of the offender, by every commercial ſtate in *Europe*.

in *France*.

In *France*, any fraud practiſed by the maſter or mariners, with or without the privity of the owners, and frauds committed by the owners themſelves, are, as we have already ſeen, accounted barratry, and are puniſhed with exemplary ſeverity. It appears by the caſe of *Nutt* v. *Bourdieu* (*a*), that the captain of a ſhip was ſentenced to the gallies for life for ſigning falſe bills of lading, in order to change the voyage and carry away the goods; and that the owner, who was convicted of being an accomplice in this crime, and of robbery in cauſing the ſhip to be carried to a wrong port, and converting the goods on board to his own uſe, was ſentenced to the gallies for five years.

How offences of this nature are puniſhed by the laws of this country, will be ſhewn in the laſt ſection of the preſent chapter, where the ſubject of fraudulent loſſes in general will be conſidered.

Sect. VII.

Of Loſs by Average Contributions.

THE ſubject of average is a branch of marine law which does not neceſſarily make a part of the law of inſurance: But as inſurers, by the general words of moſt policies, are liable to indemnify the inſured againſt thoſe contributions which are properly denominated *general average*, this ſubject muſt often incidentally occur in the conſideration of partial loſſes. It will therefore be neceſſary, in this place, to take a cnrſory view of the doctrine of averages, and of the regulations by which they are generally underſtood to be governed.

(*a*) 1 T. R. 323, ſup. 450.

Average what.

Average (*a*) is a term uſed in commerce to ſignify a contribution made by the owners of the ſhip, freight, and goods on board, in proportion to their reſpective intereſts, towards any particular loſs or expence ſuſtained for the general ſafety of the ſhip and cargo; to the end that the particular loſer may not be a greater ſufferer than the owners of the ſhip and the other owners of goods on board. Thus, where the goods of a particular merchant are thrown overboard in a ſtorm, to ſave the ſhip from ſinking, which may be lawfully done (*b*); or where the maſts, cables, anchors, or other furniture of the ſhip are cut away or deſtroyed, for the preſervation of the whole (*c*); or money or goods are given as a compoſition to pirates to ſave the reſt; or damage is ſuſtained in defending the ſhip againſt an enemy or pirate; or a ranſom, (when that is legal), is agreed to be paid to an enemy or pirate for liberating the ſhip; or an expence is incurred for phyſic and attendance in curing the officers or ſeamen wounded in defence of the ſhip; or in reclaiming the ſhip, or defending a ſuit in a foreign court of admiralty, and obtaining her diſcharge from an unjuſt capture or detention; in theſe and the like caſes, where any ſacrifice is deliberately and voluntarily made, or any expence fairly and *bonâ fide* incurred, to prevent a total loſs, ſuch ſacrifice or expence is the proper ſubject of a general contribution, and ought to be rateably borne by the owners of the ſhip, freight, and cargo, ſo that the

In what caſes average contributions become payable.

(*a*) Average is derived from the Latin word *averagium*, which comes from the verb *averare* to carry, and originally ſignified a ſervice which the tenant owed to his lord, by horſe or carriage. It is ſaid to have been introduced into commerce to ſhew the proportion and allotment to be paid by every man according to his goods *carried*. *Cowel.*——(*b*) 12 Co. 63, *Mouſe*'s caſe.——(*c*) *Si arbor vel aliud navis inſtrumentum, removendi communis periculi cauſâ dejectum eſt, contributio debetur.* ff. l. 14, *de leg. Rhod. de jact.* Vid. *Molloy*, b. 2, c. 2, § 6. But if the loſs of the maſts, anchors, ſails, &c. be occaſioned by mere ſtreſs of weather, this is not a general average, but the loſs falls on the owner. *Le Guidon*, ch. 5, art. 20. Vid. caſe of the *Copenhagen*, 1 *Rob.* Adm. Rep. 289.

loſs may fall equally on all, according to the equitable maxim of the civil law,—*Nemo debet locupletari alienâ jacturâ.* The application of this principle was underſtood by the *Rhodians*, whoſe regulations on this ſubject were adopted into the *Roman* law, and make an important head in the *Digeſt*, under the title, *De lege Rhodia de jactu* (*a*). The leading principle of which is,—*Omnium contributione ſarciatur, quod pro omnibus datum eſt.—Æquiſſimum enim eſt, commune detrimentum fieri eorum qui propter amiſſa res aliorum, conſecuti ſunt ut merces ſuas ſalvas habuerunt* (*b*).

General average.

Upon this principle is founded the doctrine of average contributions, the regulations of which make a neceſſary part of every ſyſtem of maritime juriſprudence (*c*). Average, when underſtood in this ſenſe, is called *general*, or *groſs* average, becauſe it falls generally upon the whole or groſs amount of the ſhip, freight, and cargo; and alſo to diſtinguiſh it from what is often, though improperly, termed *particular average*, but which, in truth, means a particular, or partial, and not a general, loſs, and has no affinity to average properly ſo called.

Particular average.

Petty average.

Beſide theſe, there are other ſmall charges called *petty* or *accuſtomed* averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, ſignals, inſtructions, caſtle-money, pier-money, digging the ſhip out of the ice, &c. When theſe petty charges are incurred in the uſual courſe of the voyage, they are not conſidered as a *loſs* within the meaning of the policy, but only *a neceſſary and ordinary expence*: But if incurred for any extraordinary purpoſe in the voyage, as to provide againſt any impending danger, or in conſequence of the ſhip's being driven out of her courſe by ſtreſs of weather; they will then be deemed groſs or general average, for which the inſurer will be liable (*d*)

The uſual petty averages are not a charge on the inſurers, unleſs in caſes of general danger.

(*a*) ff. lib. 14, tit. 2.——(*b*) ff. *lib.* 14, *de leg. Rhod. de jact.*—(*c*) Vid. Mo. 297. *Show.* Ca. Parl. 19. *Beawes* lex merc. 148, 1*Mag.* 64; 2*Mag.* 96, 183, *Molloy*, b. 2, c. 2, § 6, 12, ff. lib. 14. *de leg. Rhod.* art. 9. Laws of *Wiſb.* art. 20. Laws of *Ol.* art. 8. See alſo the ordinances of the different commercial ſtates, as collected by *Magens.*——(*d*) Vid. 1*Mag.* 72. 2*Mag.* 278. *Pothier*, h. t. n. 67.

A cer-

A contribution upon a general average can only be claimed in cases where, upon as much deliberation and consultation between the captain and officers as the occasion will admit of, it appears that the sacrifice, at the time it was made, was absolutely and indispensably necessary for the preservation of the ship and cargo. Some have even gone farther, and have said, that the saving of the ship and cargo must *appear* to have been in fact owing to such sacrifice (*a*). But this, beside being in most cases incapable of proof, is quite unreasonable and unjust.

General average can only be claimed where the sacrifice was absolutely necessary.

A loss which does not evidently conduce to the preservation of the ship and cargo, is not a proper ground for an average contribution: As if a pirate having made himself master of a ship and cargo, take only the goods of a particular person (*b*), or if some particular goods be damaged in a storm; in such cases the rest shall not be contributory (*c*). So, if upon the apprehension of an enemy, some goods are landed and secured on shore, and the rest taken; the owner of the goods taken shall not have average of the goods saved; for the salvage of these is not the cause of the taking of the rest; neither was the taking of those the cause of the salvage of the goods saved (*d*).

And where it conduced to the preservation of the ship.

So, it must appear that the ship and the rest of the cargo were in fact saved: For if goods be thrown overboard in a storm, and the ship afterwards perish in the same storm, there shall be no contribution of the goods saved, if any; because the object for which the goods were thrown overboard was not attained. But if the ship be preserved by the *jettison*, or throwing goods overboard, and continue her course, but is afterwards lost; the effects saved from this last misfortune, if any, shall contribute to the loss sustained by the jettison; because to that their preservation was once owing (*e*).

And where the ship was in fact saved.

(*a*) *Beawes* 148. —— (*b*) *Mal.* lex merc, 109.——(*c*) R. *Mo.* 297.——(*d*) R. *Show*, Ca. Parl. 20. ——(*e*) 2 *Mag.* 98, 240. Ord. *Louis* XIV. tit. contrib. art. 15, 16. Semb. cont. 1 *Mag.* 56. Vid. *Show.* Ca. Parl. 20. *Mo.* 297.

If goods, put into lighters to enable a ſhip to get up a river, be loſt, the reſt ſhall contribute But if the ſhip be loſt, the goods in the lighters ſhall not contribute

Upon the ſame principle, if a ſhip, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a-bar, or to ſail up, and the captain, to lighten her, put part of her cargo into lighters, and theſe lighters are loſt; the owners of the ſhip and the remaining goods ſhall contribute to this loſs; becauſe the removal of part of the cargo from the ſhip into the lighters was for the general benefit. But ſhould the ſhip be loſt, and the lighters be ſaved, the owners of the goods preſerved in the lighters ſhall not contribute to this loſs; becauſe the ſhip could not be ſaid to have been loſt for the preſervation of the goods in the lighters, and becauſe it is a general rule that a contribution is only due when the ſhip and the remaining cargo have been preſerved from the peril to which they were expoſed (*a*).

Whether the wages, &c during an unlawful detention, be a general average.

If a ſhip be unjuſtly captured and carried into a foreign port, it is ſaid that, not only the charge of reclaiming her, but alſo the wages and expences of the ſhip's company during the detention, ſhall be brought into a general average (*b*).

The queſtion, whether the wages and proviſions of the ſhip's company, during an embargo or detention by the authority of the ſtate, either at the port of departure, or at a foreign port, be a general average, has not yet been determined. The principle of the *Rhodian* law does not apply to ſuch expences, becauſe the detention does not proceed from the act of the maſter, or conduce to the general benefit. Mr. Juſtice *Buller*, in the caſe of *Da Coſta* v. *Newnham* (*c*), ſpeaking of the expence of wages and proviſions during an embargo, thus expreſſes himſelf, —"The court has ſaid, that theſe charges ſhall fall upon the owners only, and the freight muſt bear them."

Whether ſuch charges, where a ſhip is forced to go into port to refit, be a general average.

In *Beawes's Lex Mercatoria* (*d*), it is ſaid that, where a ſhip is forced to enter a port to repair the damage ſhe has ſuffered in a ſtorm, being unable to continue her voyage without apparent riſk of being loſt, the wages and pro-

(*a*) Vid. 1 *Mag.* 56. *Malyne*, 109, 110 ——(*b*) *Beawes*, 166, 1 *Mag.* 67. Vid. Ord. of *Louis* XIV. tit. *Avaries*, art. 7.—— (*c*) 2 T. R. 407. inf. ch. 13, § 2.——(*d*) 166.

viſions

viſions for the crew, from the day it was reſolved to ſeek a port to refit the veſſel, to the day of her departure from thence, with all the charges of unloading, reloading, anchorage, pilotage, and every other expence incurred by this neceſſity, ſhall be brought into a general average.

The negative clearly laid down in the *Rhodian law.*

The doctrine here laid down, is not warranted by the authorities upon this ſubject which we are taught to look up to with the greateſt reſpect. A caſe ſimilar to the caſe here put will be found in the *Digeſt*, where it is ſtated that a ſhip, in a voyage to *Oſtia*, met with a violent tempeſt, and having her rigging, maſts, and yards deſtroyed by lightning, ſhe was forced to put into *Hippo* in great diſtreſs. There ſhe underwent a complete repair, and had all neceſſaries provided for her; and having put to ſea again, ſhe arrived at *Oſtia*, and delivered her cargo in good condition. It was made a queſtion, whether the owners of the cargo ought to contribute to make good the damage which the ſhip had ſuſtained? The anſwer was in the negative; becauſe the expence incurred at *Hippo* was rather to repair the ſhip, and put her in a condition to reſume her voyage, than to preſerve the cargo (*a*).—All the modern writers on this ſubject adopt this deciſion, and hold it to be the clear law (*b*). But though there has never yet been any ſolemn deciſion on this point in any of the courts of *Weſtminſter*, the above doctrine, as laid down in *Beawes*, ſeems to have been countenanced by judges of great authority.

Lateward v. *Curling*, at N. P. after Trin. 1776. *Park* 125.

As, where an action was brought upon a policy on a ſhip, to recover the amount of wages and proviſions

Upon a policy on the ſhip, wages while the ſhip was under a repair, not occaſioned by any extraordinary accident, cannot be recovered.

(*a*) *Navis, adverſa tempeſtate depreſſa, ictu fulminis deuſtis armamentis, et arbore et antenna Hipponem delata eſt; ibique tumultuariis armamentis ad præſens comparatis, Oſtiam navigavit, et onus integrum pertulit. Quæſitum eſt, an hi, quorum onus fuit, nautæ pro damno conferre debeant.—Reſpondit, non debere hic enim ſumptis inſtruendæ magis navis quàm conſervandarum mercium gratiâ factus eſt. ff. de leg. Rhod. de jactu*, lib. 14, 2, 6.——(*b*) Vid. *Vinnius leg. Rhod.* p. 266, *Kuricke*, p. 774, *Loccenius*, lib. 2, c. 8, *Roccus de navib.* not. 59, *Emerig.* tom. 1, 624, and the other authorities there cited.

expended

expended during the time ſhe went from *Bengal* to *Bombay* to repair;—Lord *Mansfield*, as he frequently did afterwards on ſimilar occaſions, held that, as the inſurance was on the *ſhip* only, and the claim was for *wages*, the action could not be maintained. But he ſaid, that there might be caſes where exceptions to the general rule ought to be allowed; but that, in order to conſider a caſe as *excepted*, it muſt appear that the expence was abſolutely neceſſary, and occaſioned by ſome of the perils mentioned in the policy.

But there may be exceptions to this rule,

In the caſe of *Da Coſta* v. *Newnham* (*a*), Mr. Juſtice *Buller* cites the above paſſage from *Beawes*, and though it was not neceſſary, he ſaid, to determine that point then, he ſeemed diſpoſed to concur in it. It was there determined, however, that where a ſhip is obliged to put into a port to repair, and this is neceſſary for the ſafety of the whole concern, the charges of unloading, reloading, and taking care of the cargo, and alſo *the wages and proviſions of the workmen hired for the repair*, become a general average. This deciſion, which, with great deference, ſeems not to have been ſufficiently conſidered, comes very near, in principle, to the doctrine in *Beawes*: The only difference conſiſts in this, that *Beawes* allows the wages and proviſions of the ſeamen, during the interruption, to be brought into a general average; but in the above caſe, the crew were diſcharged at the place where the ſhip was repaired, and therefore it was unneceſſary to decide that point (*b*).

If a ſhip be obliged to put into port to repair, the charges of unloading and reloading the cargo, and the expences of the repair, are a general average.

Still, the leading principle of law is, that no injury occaſioned by wear and tear, or by the winds or waves, in the ordinary courſe of the voyage, ſhall be the ſubject of general average. As if the ſhip be damaged in her hull; if her ſails are blown away or deſtroyed, or her maſts, yards, cables, &c. are broken by the violence of the winds and waves, the loſs muſt fall on the owner alone (*c*).

Yet, damage occaſioned by wear and tear, or ſtreſs of weather, is not a general average.

(*a*) 2 T.R. 407, poſt. ch. 13, § 2.——(*b*) See the caſe of the *Copenhagen*, 1 *Rob.* Adm. Rep. 494. in which Sir *W. Scott* held that the expences of unloading and reloading the cargo, for the purpoſe of a repair, is a general average.——(*c*) ff. lib. 14. t. 2. *de lege Rhod. de jactu*, § 1. *Roccus* not. 60, Laws of *Oleron*, 9, of *Wiſb.* 12.

For

For the ſhip is like the tool or inſtrument of a workman in his trade. If, in doing his work, he break his hammer, his anvil, or any other inſtrument, he can claim no ſatisfaction for this from his employer. '*Si conſervatis mercibus, deterior facta ſit navis, aut quid exarmaverit, nulla facienda eſt collatio: Quia diſſimilis earum rerum cauſa ſit, quæ navis gratia parentur, et earum pro quibus mercedem aliquis acceperit. Nam et ſi faber incudem aut maleum fregerit, non imputaretur ei qui locaverit opus; Sed ſi voluntate vectorum, vel propter aliquem metum, id detrimentum factum ſit, hoc ipſum ſarciri oportet* (*a*).

In favour of *Beawes*'s doctrine it may be plauſibly urged, that, as the repair is neceſſary to the completion of the voyage, and therefore for the general benefit of the whole concern, all ought to contribute to the expence. But, in anſwer, it may be contended with better reaſon, and upon ſounder principles, that when the owner takes goods on board upon freight, he not only engages, by the uſual terms of the charter-party, 'that the ſhip ſhall 'be tight, ſtaunch, and ſtrong, and furniſhed with all 'neceſſaries for the intended voyage,' but alſo that, '*during the courſe of the voyage*, the ſhip ſhall be *kept* 'tight and ſtaunch, and furniſhed with ſufficient men, 'and other neceſſaries, to the beſt of the owner's endea-'vours.' And this is no more than the law requires of every owner who takes goods on board, without a charter-party. If, therefore, the ſhip be ſo damaged as to be incapable of proceeding on the voyage, the owners are bound to have another ſhip, if one can be procured, to carry the goods to the port of delivery; but it was never pretended that the hire of this new ſhip is a ſubject of a general average. The following caſe, though upon the conſtruction of a charter-party, is not inapplicable to this ſubject.

A ſhip, chartered for a voyage to the *Eaſt Indies* and back, ſprung a leak on her homeward paſſage, which obliged her to put into the *Cape of Good Hope*, and there take out her cargo, in order to her being repaired. Upon the ſhip's return, the owners claimed from the freighter a payment in nature of general average, towards the expence

Jackſon v. *Charnock*, 8 T. R. 509.

A ſhip is obliged by neceſſity to put into a port to repair: The expences of this repair are not a general average; the owner being bound to keep the ſhip in repair during the voyage.

(*a*) ff. l. 14, tit. 2, de leg. *Rhod.* de jact. § 2.

pence of the repair, the maintenance of the crew, and other charges occaſioned by the neceſſity of the repair. —But the court held that, by the terms of the charter-party, the owners were to keep the ſhip in repair during the voyage, at their own expence; and that the freighter was to be liable for general average only in the caſe of jettiſon; and therefore the plaintiff was not entitled to recover any thing for the expences incurred at the *Cape*.

Particular average.

If a ſhip ſpring a leak in a ſtorm, by which goods on board are ſpoiled; this is a ſimple or particular average, or particular loſs, and not the ſubject of an average contribution (*a*).

But any injury voluntarily done to the ſhip or her tackle, for the general ſafety, is a general average.

But if damage be voluntarily done to the ſhip, by cutting her ſides or deck to facilitate a neceſſary jettiſon, or by running her on ſhore to avoid an enemy, or the danger of a ſtorm (*b*); or if the captain, compelled by neceſſity, cut away and abandon his maſts, or any other part of the rigging or furniture, to lighten the ſhip in the moment of diſtreſs; the loſs and expences occaſioned by theſe ſacrifices muſt be made good by contribution. In the ſame manner are defrayed the port duties and other charges occaſioned by taking a ſhip into a port, to avoid an impending peril, and the expence of extraordinary aſſiſtance there (*c*).

Birkley & others v. *Preſgrave*, 1 *Eaſt* 220.

Therefore, where the captain cut the ſhip's cable and made other ſacrifices of the ſhip's tackle and furniture, to prevent her from being caſt away in a ſtorm; and alſo employed, and paid a number of men to keep the ſhip, which had been damaged in the ſtorm, free from water in order that a cargo of corn, which was then on board, might not be damaged; it was determined that this was a general average, and that the owner of the ſhip might maintain an action at law, againſt the owner of the corn, to recover his contribution.

The owners of the ſhip may maintain an action againſt the owner of goods on board, to recover a contribution for ſacrifices of the ſhip's tackle, and expences incurred, to ſave the goods.

(*a*) *Conſolato del mare*, ch. 63, vid. alſo ch. 193, 194. *Le Guidon* ch. 5, art. 20. Laws of *Wiſbuy*, art. 12. *Recueil de* nav. n. 59.——(*b*) *Ff.* ut ſup. 14, 2, 3, and 5. 1. R. *Marſham* v. *Dutrey*, Select Ca. of Evidence, 58——(*c*) Laws of *Wiſb.* art. 55. *Beawes*, 165, *Molloy*, b. 2, ch. 6, §. 5. *Wellwood*, tit. 20.

But,

But, where a ſhip was captured by a privateer, but, on account of a heavy gale, and the ſea running high, the privateer could not take poſſeſſion of her, and the ſhip, availing herſelf of this, effected her eſcape; but in doing ſo, carried ſuch a preſs of ſail, that ſhe was much ſtrained, moſt of her ſeams were opened, and the head of her main-maſt carried away.—In an action on a policy on this ſhip, the defendant paid 4 l. *per cent.* into court, and contended that, as the injury to the ſhip had been occaſioned by an exertion which had the effect of ſaving both ſhip and cargo, it ought to be conſidered as a *general average*; and that the proportion of this which would fall on the ſhip would be more than covered by the money paid into court, and cited the above caſe of *Birkley* v. *Preſgrave*, wherein Lord *Kenyon* ſays,—"All the articles which were made uſe of by the maſter and crew, upon the particular urgency, and out of the uſual courſe, for the benefit of the whole concern, and the other expences incurred, muſt be paid proportionably by the defendant as general average."—But the court held that the injury ſuſtained by the ſhip, in this caſe, was not the proper ſubject of a general average, but only a particular average, for which the inſured was entitled to recover.—Sir *James Mansfield* C. J. ſaid,—"The caſe cited differs materially from this caſe; for there a cable was ſacrificed for the benefit of the whole concern. This is only a common ſea riſk. If the weather had been better, or the ſhip ſtronger, nothing might have happened."

Covington v. *Roberts*, C. B. *Mich* 1808, MS. S.C. 2 New Rep. 378.

A ſhip being captured by a privateer, afterwards eſcapes by uſing a preſs of ſail; but in doing ſo, ſhe ſuffers material damage:—This was held not to be a general average, but a partial loſs, for which the underwriters were liable.

With great deference, it might be obſerved on this caſe, that the injury ſuſtained by the ſhip muſt have been, either the effect of ſea damage, in the ordinary courſe of the voyage; and then, as ſhe finally arrived at her port of deſtination, the underwriters would not have been liable for any loſs: Or, it muſt have been the effect of the effort to eſcape, and therefore a ſacrifice for the general benefit of the whole concern; in which caſe, it was the proper ſubject of a general average, and then the underwriters would be liable only for the proportion of this which would fall on the ſhip.

Obſervations on this caſe.

As to the things on board which ſhall be liable to contribute to a general average, the rule ſeems to be,—that the ſhip, freight, and every thing remaining on board that

What things ſhall be liable to contribute to a general average.

that can properly be deemed a part of the cargo, ſhall be ſubject to this charge; and therefore money, plate, and even jewels, though their *weight* could not have increaſed the danger of the ſhip, muſt contribute according to their value (*a*); becauſe the advantage derived from the ſacrifice was not in proportion to the *weight*, but to the *value* of the things ſaved. But the perſons on board, their wearing-apparel, the jewels or ornaments belonging to their perſons, ſhall not contribute (*b*). Neither are ſeamen's wages liable to contribute (*c*); for if they were, ſeamen might ſometimes be tempted to reſiſt when a ſacrifice is neceſſary for the general ſafety.

What not.

If the ſhip eſcape the dangers which made the ſacrifice neceſſary, and arrive at her port of deſtination, the captain regularly ſhould make his proteſts; and he, with ſome of the crew (*d*), muſt ſwear that the goods were thrown overboard, money paid, or other loſs ſuſtained, for the ſafety of the ſhip and goods, and for the preſervation of the lives of thoſe on board, and for no other cauſe (*e*). The average, if not ſettled before, ſhould then be adjuſted, and it ſhould be paid before the cargo is landed, for the owners of the ſhip have a *lien* on the goods on board, not only for the freight, but alſo *to anſwer all averages and contributions* that may be due (*f*).

It is the captain's duty, on his arrival in port, to ſettle the contribution.

Should this be neglected, the particular ſufferer is not without remedy: For, as it is the duty of the captain to detain the goods on board till the contribution be made, an action would, I conceive, lie againſt him, or againſt the owners, for a neglect of that duty. If the loſs were in money paid, an action on the caſe for money paid, would unqueſtionably lie againſt each perſon bound to contribute for his ſhare; if in goods, a ſpecial action on the caſe, founded on the cuſtom of trade, would lie

Remedy againſt the captain for neglecting to adjuſt the average, or to collect it.

(*a*) 1 *Mag.* 62, *Molloy* tit. Aver. § 4. Per *Buller*, J. in *Peters* v. *Milligan*, at N. P. after M. 1787.—— (*b*) Vid. *Molloy*, l. 2, c. 6, ff. 14, *de leg. Rhod.* 2, art. 8. Laws of *Oler.* art. 8. and of *Wiſb.* art. 20. As to freight, vid. 2 T. R. 407.—(*c*) 1 *Mag.* 71.——(*d*) Mal. lex merc. 113, ſays, *with moſt part of his company.*——(*e*) *Beawes* 148. *Molloy*, l. 2, c. 6, § 2. *Mal.* L. M. 113.——(*f*) *Mal.* L. M. 113.

againſt

againſt each perſon liable to contribute (*a*), or a bill in equity might be filed againſt them all.

How the contribution ſhall be ſettled.

The mode of aſcertaining the amount of each perſon's contribution, is not very accurately defined in our law. —It is uſually done, upon the ſhip's arrival at her port of diſcharge, by aſcertaining the neat value of the ſhip, freight, and cargo, as if nothing had been loſt, but all had arrived ſafe (*b*). Theſe are to be valued at the price they would fetch in ready money at the port of diſcharge; and the neat amount, after deducting all charges, is the ſum which is ſubject to the contribution (*c*). And each perſon's ſhare of the loſs will bear the ſame proportion to the value of his property, as the whole loſs bears to the aggregate value of the ſhip, freight, and cargo.

In what degree the ſhip ſhall be liable.

Different foreign ſtates have eſtabliſhed a variety of poſitive regulations, as to the *degree* in which the ſhip ſhall be liable to contribute. Some, as in *England*, make the ſhip contribute for her full value and the freight (*d*); others, for half her value, and one third of the freight; others again, for half the value of ſhip and freight.

In *England* the ſhip contributes for her full value and freight.

The ſhip and freight are valued at what they are worth at the port of delivery.

In *England*, the ſhip is valued at the price ſhe was worth on her arrival at her port of delivery; and almoſt all foreign ſtates follow the ſame rule (*e*). The value of the freight is the clear ſum which the ſhip has earned after ſeamen's wages, pilotage, and all ſuch other petty charges as come under the denomination of *petty averages*, are deducted; of which the cargo bears two thirds, and the ſhip the remaining third.

How the jettiſon ſhall be valued.

As to the mode of valuing the jettiſon, the rule of the *Roman* law is, '*Portio autem pro eſtimatione rerum* '*quæ ſalvæ ſuut, et earum quæ amiſſæ ſunt, præſtari ſolet.* '*Nec ad rem pertinet, ſi hæ, que amiſſæ ſunt, pluris veniri* '*poterunt; quoniam detrimenti, non lucri, ſit præſtatio. Sed*

(*a*) *Ma.* 297, *Show.* Ca Parl. 19, R. *Birkley* v. *Preſgrave*, 1 *Eaſt* 220. ſup. 542.——(*b*) It is neceſſary to take the goods loſt into this account, otherwiſe the owner of them would be the only perſon who would not be a loſer.——(*c*) Vid. 1 *Mag.* 69, *Molloy*, tit. Aver. § 15.——(*d*) *Konigſbergh*, *Hamburgh*, and *Copenhagen*. Vid. 2 *Mag.* 207, 237, 339.——(*e*) 2 *Mag.* ut ſup.

'*in his rebus, quarum nomine conferendum eſt, æſtimatio* '*debeat haberi, non quanti emptæ, ſint, ſed quanti venire* '*poſſunt* (*a*).' In *England* it was formerly the cuſtom to value goods at *prime coſt*, if the loſs happened before half the voyage was performed; but if after, then at the price they would have borne at the port of delivery (*b*). But that diſtinction is exploded, and it is now the ſettled practice with us, to eſtimate the goods loſt, as well as thoſe ſaved, at the price they would have fetched at the port of delivery, on the ſhip's arrival there, freight, duties, and other charges, being deducted (*c*).

Under the general words of the policy, the inſurer is bound to pay all average contributions.

If the ſacrifice be made to avert any of the perils inſured againſt, the contribution will be a loſs within the policy. And it makes no difference whether the inſured pay towards, or receive, the contribution. He muſt, in either caſe, bear his proportion of the general loſs, and this ought to fall on the inſurer. The doctrine of *Roccus* is, '*Jactu facto, ob maris tempeſtatem, pro ſublevanda navi,* '*an tenentur aſſecuratores ad ſolvendum æſtimationem rerum* '*jactarum domino ipſarum? Dic eos non teneri, quia pro re-* '*bus jactis ſit contributio, inter omnes merces habentes in illa* '*navi pro ſolvendo pretio domino ipſarum, et ideo ſi aſſecuratus* '*recuperat pretium rerum jactarum, non poteſt agere contra* '*aſſecuratores; tamen tenentur aſſecuratores ad reſciendum* '*illam ratam et portionem, quam ſolvit aſſecuratus in illam* '*contributionem faciendo inter omnes, habentes merces in illa* '*navi, quæ portio cum non recuperetur ab aliis, habetur pro* '*deperdita, et proinde ad illam portionem tenentur aſſecura-* '*tores* (*d*).'

Where goods inſured have been thrown overboard for the general benefit, it would ſeem that the owner of the goods ought, in the firſt inſtance, to claim the accuſtomed contribution, and reſort to the underwriters only for the reſidue, which is in fact the true amount of his loſs. If, however, this contribution ſhould, from whatever cauſe, remain unpaid after the voyage is ended, *Pothier* holds that

---

(*a*) *Dig.* lib. 14. tit. 2. *De lege Rhod. de jactu*, § 4.——(*b*) *Mal. Lex Merc.* 113.——(*c*) *Molloy*, tit. Aver. § 15. Vid. 2 *Mag.* 100, 285, 339.——(*d*) *Roccus*, h. t. n. 62.

the underwriter will be liable for the whole value of the *jettiſon*; and they will have a right to ſue for contribution in the name of the inſured (*a*). I cannot approve of this practice, it permits an abandonment, in a caſe where there can only be a partial loſs.

Sect. VIII.

Of Loſs by Salvage.

AS the expence of ſalvage, like average contributions, is generally a charge for which the inſurer is liable, within the meaning of the policy, the ſubject of ſalvage muſt, like that of average, ſometimes incidentally occur in the conſideration of partial loſſes; and therefore it will be proper, under this head, to enquire in what caſes, and to what amount, ſalvage ſhall be a loſs within the policy.

Salvage originally meant the thing or goods ſaved from ſhipwreck or other loſs; and in that ſenſe it is generally to be underſtood in our old books. But it is at preſent more frequently underſtood to mean the compenſation made to thoſe by whoſe means the ſhip or goods have been ſaved from the effects of ſhipwreck, fire, pirates, enemies, or any other loſs or misfortune. This compenſation, which is now uſually made in money, was, before the uſe of money became general, made by a delivery of part of the effects ſaved. At common law, the party who has ſaved the goods of another from loſs or any imminent peril, has a *lien* on the goods, and may retain them in his poſſeſſion till payment of a reaſonable ſalvage, like that which a taylor, an innkeeper, or a common carrier, has upon the clothes, the horſes, or the goods of his cuſtomer (*b*.)

Salvage what.

At common law the party has a *lien* on the things ſaved, till payment of ſalvage.

(*a*) Vid. *Pothier*, h. t. n. 52, 165.——(*b*) Per *Holt*, C. J. in *Hartford* v. *Jones*, 1 Lord *Ray*. 393; 2 *Salk*. 654; Vid. *Emerig*. tom. 2, p. 202, *Pothier*, h. t. n. 134.

How ſalvage is regulated.

Every maritime ſtate has certain regulations to aſcertain in what caſe, and to what amount, ſalvage ſhall be paid. To attempt to give an account of all ſuch regulations, in foreign countries, would be more a work of curioſity than of utility.—It will be ſufficient for our preſent purpoſe, to ſtate ſhortly the regulations which the law of *England* has eſtabliſhed on this ſubject, and which will be principally found in our ſtatutes; ſome of which are of very ancient date (*a*). But the regulations upon this ſubject which are now principally in force, are found in the ſtat. 12 An. ſtat. 2. c. 18. and ſubſequent acts, made for the protection of ſhips and goods ſtranded on the coaſts of this kingdom.

By 12 *An.* ſtat. 2, c. 18, § 2, Perſons employed in the ſalvage of ſhips, &c. ſhall within 30 days be paid a reaſonable reward.

How ſecured to them.

That ſtatute, after directing the means to be employed for the preſervation of ſhips in diſtreſs, enacts, (§ 2.) 'That, all perſons who ſhall be employed in preſerving 'ſhips or veſſels in diſtreſs, or their cargoes, ſhall, 'within 30 days after the ſervice performed, be paid a '*reaſonable reward* for the ſame, by the commander or 'other ſuperior officer, mariners, or owners of the ſhip 'or goods ſo ſaved; and in default thereof, the ſhip, 'veſſel, or goods ſo ſaved ſhall remain in cuſtody of the 'collector of the cuſtoms or his deputy, until all charges 'ſhall be paid, and until all perſons ſo employed ſhall 'be reaſonably gratified for their trouble; or good ſecu-'rity given, to the ſatisfaction of the ſeveral parties that 'are to receive the ſame. And in caſe the commander 'or other ſuperior officer, mariners, or owners, of the 'ſhip or goods ſo ſaved, ſhall diſagree with the ſaid 'officer of the cuſtoms (*b*), touching the money deſerved 'by the perſons ſo employed, the commander of the

If the parties diſagree about the *quantum*, three neighbouring juſtices ſhall adjuſt it.

(*a*) 3 *Ed.* I. c. 4; 4 *Ed.* I. c. 2; 27 *Ed.* III. c. 13.—

(*b*) Where the ſalvage is made by a perſon employed by the maſter of the veſſel in diſtreſs, though under the inſpection of the officers of the cuſtoms, the perſon ſo employed ſhall be conſidered as the agent of the owners; and a diſagreement between him and the owners, as to the quantum of his charges, cannot be adjuſted by three magiſtrates, that not being a caſe within this act. R. *Baring* v. *Day*, 3 *Eaſt* 57.

'ſhip

'ſhip ſaved, or the owner of the goods therein, and the 'ſaid officer of the cuſtoms may nominate three neigh-'bouring juſtices, who ſhall adjuſt the *quantum* of the 'gratuity to be paid to the ſeveral perſons acting in the 'ſalvage of the ſhip or goods; and ſuch adjuſtment 'ſhall be binding to all parties, and ſhall be recoverable 'in an action at law to be brought by the reſpective 'perſons to whom the ſame ſhall be allotted by the juſ-'tices. And in caſe no perſon ſhall appear to make his 'claim to all or any of the goods ſaved, then the chief 'officer of the cuſtoms of the neareſt port, ſhall apply 'to three of the neareſt juſtices, who ſhall put him or 'ſome reſponſible perſon in poſſeſſion of ſuch goods, 'ſuch juſtices taking an account thereof in writing, to 'be ſigned by ſuch officers of the cuſtoms; and if the 'goods ſhall not be legally claimed within 12 months, by 'the right owners, they ſhall be publicly ſold, or, if pe-'riſhable, forthwith ſold, and the produce of the ſale, 'after all charges deducted, with a fair account of the 'whole, ſhall be tranſmitted to the *Exchequer*, there to 'remain for the benefit of the owner, when appearing; 'who, upon affidavit, or other proof of his right, to 'the ſatisfaction of one of the barons of the coif, ſhall, 'upon his order, receive the ſame out of the *Exchequer*.'

How the goods ſaved ſhall be diſpoſed of, if no owner appears.

This ſtatute alſo preſcribes the puniſhment to be inflicted on perſons guilty of plundering or deſtroying ſhips in diſtreſs. But this being found inſufficient to repreſs theſe barbarous practices, the ſtat. 26 *G.* II., c. 19, has enacted a variety of further regulations for the more effectual puniſhment of offenders and the better protection of ſhips in diſtreſs.

On the ſubject of ſalvage, the 5th ſection of this act provides, 'That in caſe any perſon, not employed in the 'ſalvage of the ſhip or goods, ſhall, in the abſence of 'the perſons ſo employed and authorized, ſave any ſuch 'ſhip or goods, and cauſe the ſame to be carried, for 'the benefit of the owners, into port, or to any near ad-'joining cuſtom-houſe, or other place of ſafe cuſtody, 'immediately giving notice thereof to ſome magiſtrate 'or cuſtom-houſe or exciſe-officer; or ſhall diſcover to

By 26 *G.* II. c. 19, § 5 Perſons, though not *employed*, who ſhall ſave any ſhip or goods, or give notice of any goods unlawfully bought, ſold, or concealed, ſhall be entitled to ſalvage.

'ſuch magiſtrate or officer where ſuch goods are wrong-
'fully bought, ſold, or concealed, then ſuch perſon ſhall
'be entitled to a reaſonable reward for ſuch ſervices;
'to be paid by the maſter or owners of ſuch veſſels or
'goods; and to be adjuſted in caſe of diſagreement
'about the *quantum*, in like manner as the ſalvage is to
'be adjuſted and paid by virtue of the ſtat. 12 *Ann.*'

By § 6. The neareſt magiſtrate, collector of the cuſtoms, or chief conſtable ſhall call a meeting of the ſheriff, magiſtrates, &c. five of whom may employ perſons for ſaving ſhips, &c.

And by § 6, 'For the better aſcertaining the ſalvage
'to be paid in purſuance of this and the former act,
'the juſtice, mayor, bailiff, collector of the cuſtoms, or
'chief conſtable, who ſhall be neareſt to the place where
'the ſhip or goods ſhall be ſtranded, ſhall forthwith give
'public notice for a meeting, to be held as ſoon as poſ-
'ſible, of the ſheriff, or his deputy, the juſtices, mayors,
'or other chief magiſtrates of towns, coroners, or com-
'miſſioners of the land tax, or any five or more of
'them, who are required to give aid in the execution
'of this and the former act, and to employ proper
'perſons for the ſaving of ſhips in diſtreſs, and ſuch
'ſhips and effects as ſhall be ſtranded or caſt away;
'and alſo to examine perſons on oath touching the ſame,
'or the ſalvage thereof, and to adjuſt the *quantum* of
'ſuch ſalvage, and diſtribute the ſame among the per-
'ſons concerned in ſuch ſalvage, in caſe of diſagree-
'ment among the parties, or the ſaid perſons; and that
'every ſuch magiſtrate, &c. attending and acting at ſuch
'meeting, ſhall be paid four ſhillings a-day for his ex-
'pences, out of the goods ſaved by their care or direc-
'tion.—Provided (§ 7.) that if the charges and rewards
'for ſalvage, directed to be paid by this and the former
'act, ſhall not be fully paid, or ſufficient ſecurity given
'for the ſame within 40 days after the ſervices per-
'formed, the officer of the cuſtoms concerned in ſuch
'ſalvage ſhall borrow or raiſe ſo much money as ſhall
'be ſufficient to pay ſuch charges, or any part thereof
'remaining unpaid, or not ſecured as aforeſaid, by or
'upon one or more bill or bills of ſale under his hand
'and ſeal, of the ſhip or veſſel, or cargo ſaved, or ſuch
'part thereof as ſhall be ſufficient, redeemable on pay-
'ment of the principal ſum borrowed, and intereſt at
'4 *per cent. per annum.*'

And examine perſons on oath, &c. to adjuſt the *quantum* of ſalvage.

Such magiſtrate, &c. to have 4s. a-day.

By § 7, if the ſalvage be not paid, or ſecurity given within 40 days, the officer of the cuſtoms ſhall raiſe money by bill of ſale of the ſhip or goods ſaved, redeemable on payment of principal and 4 *per cent.* intereſt.

There

There are many other regulations in this act, as to the perſons by whom this and the former act ſhall be put in force, and as to the detection and puniſhment of offenders. The foregoing extracts which have been made for the purpoſe of ſhewing that, by our law, the ſalvage of ſhips or goods ſtranded or caſt away, is a reaſonable ſatisfaction to the perſons employed in ſaving and protecting them, for their labour; to be eſtimated, not according to their own arbitrary will, but by perſons of the firſt reſpectability in and near the place where the misfortune happens.

How ſalvage upon a *recapture* was regulated by the marine law.

With reſpect to ſalvage in the caſe of recapture, by the marine law of *England*, as practiſed by our courts of admiralty, previous to any parliamentary regulations, if the ſhip or goods were retaken before condemnation, till which time the *jus poſtliminii* continued, the original owner was entitled to have reſtitution decreed to him, on payment of a *reaſonable ſalvage* to the recaptors. But by ſeveral ſtatutes (*a*), ſalvage upon a recapture was fixed at certain rates, according to the length of time the recaptured ſhip was in the hands of the enemy. It will be ſufficient, however, for our preſent purpoſe, to ſtate the regulations now in force as they were eſtabliſhed by the laſt prize act.

By 43 *G.* III. c. 160, ſhips, &c. *at any time* recaptured, ſhall pay, if retaken by men of war, one *eighth*, if by privateers, one *ſixth*, for ſalvage.

By ſtat. 43 *G.* III. c. 160. § 39. 'If any ſhip or veſſel, 'taken as prize (*b*), or any goods therein, ſhall appear, in 'the court of admiralty, to have belonged to any of his 'Majeſty's ſubjects, which were before taken by any of his 'Majeſty's enemies, and at any time afterwards retaken 'by any of his Majeſty's ſhips, or any privateer, or other 'ſhip or veſſel under his Majeſty's protection; ſuch ſhips, 'veſſels, and goods ſhall, in all caſes, (ſave as hereafter 'excepted), be adjudged to be reſtored, and ſhall be ac-

(*a*) Vid. 13 *G.* II. c. 4. and 29 *G.* II. c. 34.—(*b*) The right of reſtitution under this act is confined to caſes of capture during actual hoſtilities; and cannot be extended to the caſe of a veſſel confiſcated in time of peace for an alledged violation of the revenue laws of *France*. Caſe of the *Jeune Voyageur*, 5 *Rob.* Adm. Rep. 1.

'cordingly reſtored, to ſuch former owner or owners, he 'or they paying for ſalvage, if retaken by any of *his* '*Majeſty's ſhips*, *one eighth* part of the true value thereof, 'to the flag officers, captains, &c. to be divided as the 'ſame act directs: And if retaken by any *privateer*, or 'other ſhip or veſſel, *one ſixth* part of the true value of 'ſuch ſhips and goods, to be paid to the owners, officers, 'and ſeamen of ſuch privateer or other veſſel, without 'any deduction. And if retaken by the joint operation 'of one or more of his Majeſty's ſhips, and one or more 'private ſhips of war, the judge of the court of admi-'ralty, or other court having cognizance thereof, ſhall 'order ſuch ſalvage, and in ſuch proportions, to be paid 'to the captors, by the owners, as he ſhall, under the 'circumſtances of the caſe deem fit and reaſonable. But 'if ſuch recaptured ſhip or veſſel ſhall appear to have 'been ſet forth, by the enemy, as a ſhip or veſſel of war, 'the ſaid ſhip or veſſel ſhall not be reſtored to the former 'owners; but ſhall, in all caſes, whether retaken by any 'of his Majeſty's ſhips, or by any privateer, be adjudged 'lawful prize for the benefit of the captors.'

If retaken by both jointly, the judge of the admiralty ſhall order ſuch ſalvage, and in ſuch proportions, as he ſhall deem fit.

But if the recaptured ſhip be ſet forth by the enemy as a *ſhip of war*, ſhe ſhall be lawful prize to the recaptors.

As the inſurer does not, in expreſs words, undertake to pay ſalvage, perhaps the inſured could not declare for a loſs *by the payment of ſalvage*. That form of declaring might, perhaps, be thought too general. Indeed it would be uſeleſs to declare ſo, for he may declare as for that ſpecies of loſs which occaſioned the payment of ſalvage, and recover the ſalvage actually paid (*a*). And upon the ſame declaration he may recover for the loſs, if any, ſuſtained by damage done to the goods ſaved.

The inſured need not *declare* for ſalvage, but may recover under a declaration for the loſs which occaſioned it, and for the damage the goods ſaved have ſuſtained.

It is uſual, in caſes of capture and recapture, to declare upon a total loſs by capture, and upon this the plaintiff may recover the amount of the ſalvage and expences.

The court of admiralty regulates the rate of ſalvage in the caſe of recaptured *neutrals*.

Theſe regulations relate only to the ſalvage of *Britiſh* ſhips recaptured. In the caſe of *neutral* ſhips captured by the enemy, and retaken by *Britiſh* men of war or privateers, the courts of admiralty have a diſcretionary

(*a*) R. *Cary* v *King*, Ca. Temp. *Hard.* 304. Vid. inf. ch. 16, § 2.

power of allowing ſuch ſalvage, and in ſuch proportions, as, under the circumſtances of each particular caſe, may appear juſt. But there is no poſitive law or binding regulation, to which parties may appeal for aſcertaining the rate of ſuch ſalvage.—Sir *William Scott* holds (*a*), that no ſalvage is due upon recapture of neutral property out of the hands of the enemy, unleſs it appear from the ordinances, or the practice of the prize-courts of the enemy, that the firſt ſeizure was made under ſuch circumſtances as would have expoſed the goods to condemnation in the hands of the enemy.

In the caſe of recaptured *allies.*

As to *allies*, our courts of admiralty hold that the maritime law of *England* having adopted a moſt liberal rule of reſtitution on ſalvage, with reſpect to the recaptured property of its own ſubjects, gives the benefit of that rule to its allies, till it appear that they act towards *Britiſh* property on a leſs liberal principle: In ſuch caſe it adopts their rule, and treats them according to their own meaſure of juſtice (*b*).

Salvage upon recapture muſt be paid under an adjudication of a court of admiralty, to entitle the inſured to claim it from the underwriters.

Before an action will lie for a loſs by payment of ſalvage upon a recapture, the amount of ſuch ſalvage muſt have been aſcertained by the deciſion of a court of admiralty, which alone has juriſdiction to determine as to the *right* to ſalvage in every ſuch caſe; and, in the caſe of the recapture of neutrals, as to the *amount* of ſuch ſalvage.

When the ſalvage, however, is very high, which may happen in the caſe of ſhipwreck, the inſured may abandon, and call upon the inſurer as for a total loſs, as we ſhall have occaſion more particularly to obſerve hereafter, in the chapter upon abandonment.

(*a*) In the caſe of the *Carlotta*, 5 *Rob.* Adm. Rep. 54.——
(*b*) So laid down by Sir *William Scott*, in the caſe of the *Santa Cruz*, 1 *Rob.* Adm. Rep. 63, in which caſe this ſubject will be found conſidered much at large, and in his very luminous manner.

Sect.

Sect. IX.

Of Loſs by the Death of Slaves.

AS the act for the abolition of the *African* ſlave trade, only prohibits and declares unlawful inſurances upon the trade *ſo aboliſhed* (*a*), inſurances upon a trading in *African* ſlaves, by the ſubjects of any foreign ſtate, may ſtill, I conceive, be legally made in this country. For this reaſon, and becauſe queſtions may yet ariſe on policies which were effected in this country before the abolition of this trade, it will be proper here to ſhew what ſhall be deemed a loſs by the death of ſlaves.

Whether natural death would now be a legal riſk

Though we have now no ſtatute in force for the *regulation* of the ſlave trade, it is very improbable that in a caſe of *foreign* ſlave trade, our courts would be diſpoſed to tolerate an inſurance againſt the mortality of the ſlaves by natural death or ill treatment. It may therefore be proper here to ſhew in what caſes the death of ſlaves ſhall be deemed a loſs within a policy on ſlaves.

Whether a loſs by ſlaves thrown overboard in a ſcarcity of water could be inſured againſt.

If the maſter of a ſlave ſhip miſtake his courſe, whereby a ſcarcity of water enſues, and a number of the ſlaves are thrown overboard for the preſervation of the ſhip's crew and the reſt of the ſlaves, this has been holden not to be a loſs *by the perils of the ſea* (*b*): Nor would it be a loſs of any deſcription within the common policy; and no words, I conceive, could be legally inſerted in a policy to meet ſuch a caſe.

If from the length of the voyage there be a ſcarcity of proviſions, and ſome of the ſlaves die for want of food, this is natural death.

So where a ſlave ſhip, on her paſſage to the *Weſt Indies*, was ſo retarded by bad weather and other unavoidable accidents, that from the extraordinary length of the voyage, the proviſions for the ſlaves were exhauſted, and many of them died from the want of proper food: In this caſe, though the failure of the proviſions was occaſioned by the perils of the ſea, and the death of the ſlaves

(*a*) Vid. ſtat. 47 *G.* III. c 36, § 1, 5.——(*b*) R. *Gregſon* v. *Gilbert*, B. R. 23 *G.* III. *Park.* 62. inf. ch. 16, § 2.

was

was the neceſſary conſequence of this; the loſs muſt be aſcribed to natural death (*a*).

What ſhall be mortality by mutiny.

If, in a policy on ſlaves, mortality by *mutiny* be included in the perils inſured againſt; and, in a mutiny, ſome are killed, others die of their wounds received in the mutiny, others of chagrin, others by ſwallowing ſalt water, others jump overboard and are drowned: The underwriters are liable for thoſe who are killed, or mortally wounded, in the mutiny; but not for thoſe who died from the other cauſes (*b*).

Sect. X.

Of Loſs by the Death of Animals.

Valin, and, after him, *Pothier*, claſs animals and negro ſlaves under the ſame head, and apply the ſame rules to both (*c*).—According to theſe learned writers, if animals, ſuch as horſes and other cattle, or beaſts or birds of curioſity, be inſured in their paſſage by ſea; their death occaſioned by tempeſts, by the ſhot of an enemy, by jettiſon in a ſtorm, or by any other extraordinary accident occaſioned by any of the perils enumerated in the policy, is a loſs for which the underwriters are liable. Not ſo, if it be occaſioned by mere diſeaſe or natural death (*d*).

(*a*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656.——(*b*) R. *Jones* v. *Schmoll*, 1 T. R. 130. n. —— (*c*) Vid. *Valin* h. t. art. 11, 15. *Pothier* h. t. n. 66. —— (*d*) *Valin* h. t. art. 29, p. 76, *Pothier* h. t. n. 66. *Emerig*, tom. 1. p. 393.

Sect. XI.

Of fraudulent Loſſes.

AT the concluſion of the ſixth ſection of the preſent chapter (*a*) we ſhortly adverted to the puniſhment of barratry by the laws of other countries. We will, in the preſent ſection, ſhew how piracy and other offences of this nature, and alſo the offence of procuring wilful and fraudulent loſſes, with intent to defraud inſurers, are puniſhable by the law of *England*.

How piracy is puniſhed by the law of *England*.

The crime of piracy, or robbery upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, as Lord *Coke* deſcribes him, *hoſtis humani generis*. By the ancient common law, piracy, if committed by a *ſubject*, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an *alien*, to be felony only: But now, ſince the ſtatute of treaſons, 25 *Ed.* III. c. 2. it is holden to be only felony in a ſubject (*b*). Formerly this offence was only cognizable by the admiralty courts, which proceed by the rules of the civil law (*c*). But it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away, unleſs by the judgment of his peers, the ſtat. 28 *H.* VIII, c. 15, eſtabliſhed a new juriſdiction for this purpoſe, which proceeds according to the courſe of the common law (*d*).

The offence of piracy by the common law, conſiſts in the committing of thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would amount to felony there (*e*). But by ſtat. 11 and 12 *W.* III. c. 7, § 8 and 9. 'If any natural 'born ſubject commit any act of hoſtility upon the high

(*a*) Sup. 534.——(*b*) 3 Inſt. 113.——(*c*) 1 *Hawk.* P. C. 98.——(*d*) Vid. 4. *Bl.* Com. 71.——(*e*) 1 *Haw.* P. C. 100.

'ſeas,

'seas, against others of his Majesty's subjects, under 'colour of a commission from any foreign power; 'or if any commander or mariner shall betray his trust, 'and run away with any ship, boat, ordnance ammu- 'nition or goods; or yield them up voluntarily to any 'pirate; or bring any seducing message from any pi- 'rate, enemy, or rebel; or consult, combine, or con- 'federate with, or attempt to corrupt, any officer or 'mariners to yield up, or run away with, any ship or 'goods, or turn pirate; or shall lay violent hands on 'his commander, to hinder him from fighting in de- 'fence of his ship; or shall confine him, or make, or 'endeavour to make, any revolt in the ship, shall be 'adjudged to be a pirate, felon, and robber, and shall 'suffer death and loss of lands, as a pirate, felon and 'robber on the sea ought to suffer, whether he be 'principal, or merely accessary by setting forth such 'pirates, or abetting them before the fact, or receiving 'or concealing them or their goods, after it:' And the stat. 4 *G.* I. c. 11. expressly excludes the principals from the benefit of clergy. By the stat. 8 *G.* I. c. 24, trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose; or confederating or corresponding with them, or forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy; and such accessaries to piracy as are described in the above stat. 11 and 12 *W.* III. are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. Thus does the statute law of *England* aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon offences against that universal law.

The stat. 1 *An.* st. 2, c. 9, § 4 and 5, makes it a simple felony in any master or mariner, wilfully to cast away, burn, or destroy any ship to which he belongs, to the prejudice of the *owner*, or of any *merchant who shall load goods thereon*; and takes away the benefit

The 1 *An.* st. 2, c. 9, makes it felony to destroy any ship, to the prejudice of the owners of the ship or goods on board; and takes away clergy, if committed at sea.

nefit of clergy from ſuch offences, *committed on the high ſeas.*

The 4 G. I. c. 12, extends this to the caſe of the owner or maſter who ſhall deſtroy any ſhip to the prejudice of the owners of, or underwriters upon, goods.

Though the inſurers are only anſwerable for loſſes ariſing from the *accidents and misfortunes* incident to maritime adventures, and not for ſuch as proceed from contrivance or deſign on the part of the inſured; yet the temptation to defraud inſurers by the wilful and concerted deſtruction of ſhips and goods inſured, in order to give a colour to fraudulent claims for pretended loſſes, has been found productive of ſo many evils, that it became neceſſary for the legiſlature to interpoſe its authority to reſtrain them: And therefore, by ſtat. 4 *G.* I. c. 12, § 3, 'If any owner, captain, maſter, mariner, or other officer of any ſhip, ſhall willfully caſt away, burn, or otherwiſe deſtroy the ſhip, of which he is owner, or to which he belongs; or in any manner direct or procure the ſame to be done, to the prejudice of the perſon or perſons that ſhall underwrite any policy of inſurance thereon; or of any merchant that ſhall load goods thereon, ſhall ſuffer death.'

The 11 G. I. c. 29, takes away clergy from ſuch offences in all caſes.

This ſtatute having only made this crime a ſimple felony, it was found inſufficient to reſtrain the commiſſion of it, and therefore the ſtat. 11 *G.* I. c. 29, § 6 and 7, takes away from it the benefit of clergy, and inflicts the ſame puniſhment on perſons guilty of the like offences, '*with intent to prejudice any owner of ſuch ſhip:*' And it further enacts, that if ſuch offences be committed within the body of any county, they ſhall be tried in the ſame manner as other felonies; if on the high ſeas, then according to the directions of the ſtat. 28 *H.* 8. c. 15.

CHAP. XIII.

Of Abandonment.

Preliminary Obſervations.

Nature of abandonment.

IT has already been obſerved (*a*) that the term *total loſs* does not only ſignify the abſolute deſtruction of the thing inſured, according to its natural import; but alſo that, in legal and commercial language, it means ſuch a loſs or damage to the thing inſured, though it ſpecifically remain, as renders it of little or no value to the owner. It alſo means any loſs or misfortune whereby the voyage is loſt, or not worth purſuing, and the projected adventure fruſtrated. In ſuch caſes the inſured is entitled to call upon the inſurer as for a total loſs: But then he muſt *abandon*; that is, he muſt renounce and yield up to the inſurer all his right, title and claim, to what may be ſaved, and leave it to him to make the moſt of it for his own benefit. The inſurer then ſtands in the place of the inſured, and becomes legally entitled to all that can be reſcued from deſtruction (*b*). The idea of abandonment therefore, pre-ſuppoſes a total loſs in this latter ſenſe, and implies that ſomething remains which may be ſaved, and which may be given up, or abandoned, to the inſurers. For if the inſured could only abandon, in the caſe of a total loſs, in the ſtrict and natural ſenſe of the words, there would be nothing to abandon, and abandonment could then be only an uſeleſs form.

Whether coeval with inſurance itſelf.

It has been ſaid that the practice of abandoning dates its origin from the period when the contract of inſurance itſelf firſt came into uſe (*c*); and yet it does not ſeem to be a right which neceſſarily reſults from the nature

(*a*) Sup. 485.—— (*b*) Vid. *Pothier*, h. t. n. 133. Ord. of *Louis* XIV, h. t. art. 47. Ord. *Bilboa*, art. 32. 1 *Vez.* 98. ——(*c*) *Park* 143.

of

of the contract.—That the loſs or damage ſhould be made good by the inſurer, who has made himſelf reſponſible, is perfectly reaſonable, and conformable to the ſpirit of the contract. But it does not neceſſarily follow from thence, that, in caſe of a diſaſter, he ſhould be *forced* to become the proprietor of the ſhip or goods inſured, merely becauſe he was a ſurety for their ſafe arrival: indeed the author of *Le Guydon* (*a*) ſays, that abandonment is only to be reſorted to in extreme caſes.

Its probable origin

If ſeems more probable that abandonment aroſe from the practice of occaſionally introducing into policies particular ſtipulations, that if the thing inſured ſhould be ſpoiled or greatly damaged by any of the perils inſured againſt, it ſhould be abandoned to the inſurers, who ſhould be thereupon obliged to pay the entire ſum inſured; and that ſimply making good the damage ſhould not be ſufficient to diſcharge them; and ſtipulations like this, being frequently introduced into the contract, became at length the foundation of general rules, which have been eſtabliſhed by poſitive law in ſome countries, and adopted in others as part of the general law of inſurance.

Whether carried too far.

Be this as it may, it has been thought that, in many inſtances, the practice of abandoning has been carried too far; and that the inſured ſhould, in no caſe, be permitted to abandon, where the effects inſured, or the greateſt part of them, ſtill exiſt, and are in the power of the inſured. Mr. Juſtice *Buller* ſeems to have been of opinion, that when this queſtion firſt came before our courts, it would have been the wiſeſt policy to have determined that the owners ſhould in no caſe be allowed to abandon, where the property ſtill exiſted (*b*). The firſt caſe we find, in our books on the right of abandonment, came before Lord *Hardwicke* in the court of Chancery in the year 1744; and he, after ſome deliberation, determined that where a recaptured ſhip and cargo were ſold to pay the ſalvage, the inſured had a right to abandon the ſurplus, and claim as for a total loſs (*c*).

(*a*) C. 7, art. 2. (*b*) Vid. 1 T. R. 615, 616. (*c*) Vid. *Pringle* v. *Hartley*, 3 *Atk.* 195, inf.

It

It muſt be admitted that the privilege of abandoning, in every caſe that is deemed a total loſs, may ſometimes be liable to great abuſe. For inſtance, where, as in the caſe of capture, the thing inſured, and every part of it, is completely gone out of the power of the inſured, it is juſt and proper that he ſhould recover at once as for a total loſs, and leave the *ſpes recuperandi* to the inſurer who will have the benefit of a recapture, or of any other accident, by which the thing may be recovered. But it ſeems, at firſt ſight, impolitic, not to ſay unreaſonable, that the owner of a ſhip which is ſtranded, (the captain and crew being his ſervants, on the ſpot, and in poſſeſſion of the ſhip and cargo), ſhould be at liberty to abandon theſe to a number of underwriters, who ſometimes find it difficult to act in concert, and who have, perhaps, no means of diſpoſing of the property thus thrown upon their hands, but to the greateſt diſadvantage.

On the other hand it may be truly ſaid that the captain muſt occaſionally be the agent, not only of the owners or freighters of the ſhip, but alſo of every perſon intereſted either in the ſhip or cargo; that he, in caſe of misfortune, is bound to do the beſt in his power for the benefit of all concerned; and that, whether he diſpoſe of what is ſaved for account of the inſured, or of the inſurer, comes to the ſame thing, ſince in both caſes the amount muſt go in diminution of a total loſs. Still it muſt occur to every perſon who has any experience in ſubjects of this nature, that it were much better that the maſter, in caſe of misfortune, ſhould continue the agent accountable to the owners who know him, and who know the extent of his charge, than to the underwriters who know neither.

Having premiſed thus much of the general nature of abandonment, we will now proceed to conſider,

I. *In what caſes the inſured may abandon;*
II. *Within what time he may abandon;*
III. *The form of the abandonment;*
IV. *The effect of it;*
V. *Of the ordering and diſpoſal of the effects abandoned.*

Sect. I.

In what cases the insured may abandon.

The general principle upon which the right of abandoning refts.

IN general it may be laid down that, by the law of inſurance, as underſtood in *England*, the inſured may abandon in every caſe where, by the happening of any of the misfortunes or perils inſured againſt, the voyage is loſt, or not worth purſuing, and the projected adventure is fruſtrated; or where the thing inſured is ſo damaged and ſpoiled as to be of little or no value to the owner; or where the ſalvage is very high; or where what is ſaved is of leſs value than the freight; or where further expence is neceſſary, and the inſurer will not undertake, at all events, to pay that expence, &c. (*a*).

In what caſe it is permitted in *France*.

The ordinance of the marine of *Louis* XIV. (*b*) which in this, as in moſt other particulars, is collected from the ſame ancient ſources from whence other countries have drawn their principles of the law of inſurance, confines abandonment to theſe five caſes; capture, ſhipwreck, ſtranding, arreſt of princes, or the *entire loſs of the effects inſured* (*c*).

Valin thinks the latter words mean, not an abſolute deſtruction, but a *general loſs* (*d*).—*Pothier* ſays, they mean a total, or *almoſt* total, loſs (*e*). This he explains by ſaying, that goods which are conſiderably damaged are deemed to be goods loſt; and therefore when all, or almoſt all, the goods are in that ſtate, it is a total loſs. Both theſe authors cite *Le Guidon*, where it is laid down that the inſured may abandon when there is an average loſs or damage which exceeds half the value of the goods inſured,

---

(*a*) Per Lord *Mansfield*, in *Milles* v. *Fletcher*, inf. ——(*b*) h. t. art. 46. ——(*c*) "*Perte entiere des effets aſſurés*"——(*d*) "*Perte generique des effets aſſurés, ſans être abſolue.*" *Valin* on art. 19, h. t. p. 61.——(*e*) "*Perte totale ou preſque totale des effets aſſurés.*" *Pothier*, h. t. n. 119.

or in caſe they be ſo damaged as not to be worth the freight or little more (*a*).

Emerigon objects to both theſe interpretations as being vague and uncertain, and as leaving it too much in the breaſt of the judge to decide what ſhall be an *entire*, or *almoſt* entire, loſs, which, he ſays, muſt lead to great doubts and ruinous litigation (*b*).

By the *French* law, the right to abandon ſeems to depend on the *ſpecies of misfortune* which has happened; with us it depends rather on the *degree of loſs* ſuſtained in conſequence of it.

Such are the general principles upon which the right of abandoning reſts: We will now take a view of the caſes in which thoſe principles have been exemplified, 1ſt, *Upon loſſes by capture, and arreſt of princes*; *and*, 2dly, *upon other loſſes*.

1. *Of the right of abandoning, upon Capture, and arreſt of Princes.*

As capture and arreſt of princes have afforded the moſt frequent occaſions for abandonment, ſo moſt of the great leading principles upon which the right of abandoning reſts, have been diſcuſſed and eſtabliſhed in caſes of that ſort.

Capture by an enemy or a pirate, or an arreſt of princes, or even an embargo, is *primâ facie* a total loſs; and immediately upon the capture, or upon a mere arreſt, or at any time while the ſhip continues under detention, the inſured may elect to abandon, and give notice to the inſurer of his intention to do ſo, and thus entitle himſelf

Capture or arreſt of princes is, *primâ facie* a total loſs, for which the inſured may abandon.

(*a*) "*Le marchand chargeur eſt en liberté de faire à ſes aſſureurs de la propriété qu'il a en la marchandiſe chargée, lors et quand il advient avarie qui excéde ou endommage la moitié de la marchandiſe, ou telle empirance en la marchandiſe qu'elle ne value le frêt, ou peu de choſe d'avantage.*" *Le Guidon*, ch. 7, art. 1 —— (*b*) *Emerig.* tom. 2, p. 183.

to claim as for a total loſs from the inſurer: For, from the moment of the capture, or arreſt, the owners loſe their power over the ſhip and cargo, and are deprived of the free diſpoſal of them; and, in the opinion of the merchant, his right of diſpoſal being ſuſpended or rendered uncertain, is equivalent to a total deprivation. It would therefore be unreaſonable to oblige the inſured to wait the event of capture, detention, or embargo (*a*).

And he is not bound to litigate the validity of the capture.

And immediately, upon receiving intelligence of a capture, he may abandon; nor is he bound to make any claim or appeal to the enemy's courts of admiralty, or to litigate there the validity of the capture; but may wholly leave that to the underwriters (*b*).

But he is not *bound* to abandon upon a capture.

But the inſured is, in no caſe, *bound* to abandon; and, as the law now ſtands, no capture of the enemy can be ſo total a loſs as to leave no poſſibility of recovery, for the *jus poſtliminii* continues for ever, except in the caſe of a captured ſhip being turned into a ſhip of war. If the owner himſelf ſhould retake the ſhip or goods, he will be fully entitled to them; and if they be retaken at any time by another, whether before or after condemnation, he will be entitled to reſtitution, upon payment of a ſettled ſalvage (*c*).—The chance of the owner's recovering his property does not, however, ſuſpend his right to demand as for a total loſs: But, in the caſe of a recapture, juſtice is conſidered to be done to the inſurer by putting him in the place of the inſured. A policy of inſurance, as a contract of *indemnity*, is always liberally conſtrued (*d*).

From a wager policy the inſured cannot abandon.

There is this difference between a policy *upon intereſt*, and a *wager policy*, that, in the one caſe the inſured may, if he think proper, abandon the moment he has notice of a capture or detention, and this will bind the underwriters, whatever may be the ultimate fate of the ſhip; but in the

(*a*) Vid. Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 696. *inf.* 567.——(*b*) Vid. 2 *Bur.* 696; *Admr.* in *Tyſon* v. *Gurney*, 3 T. R. 479.——(*c*) Vid. ſtat. 43 G. III. ch. 160, *ſup.* 551.——(*d*) See Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 696, 7.

caſe

caſe of a wager policy, there can be no abandonment, becauſe the inſured has nothing to abandon (*a*).

But a capture or arreſt does not neceſſarily, and at all events, terminate in a total loſs, ſo as to entitle the inſured to abandon at any time; for, as he cannot abandon till he has received advice of the loſs, if, at the time he receives ſuch advice, or before he has elected to abandon, he receive advice that the ſhip or goods inſured are recovered, or are in ſafety, he cannot then abandon; becauſe he can only abandon *while* it is a total loſs, and he knows it to be ſo, not after he knows of the recovery. Therefore, if a captured ſhip be retaken and permitted to proceed on her voyage, ſo that ſhe ſuffer but a ſmall temporary inconvenience; this is only a partial, and not a total, loſs (*b*).

But a capture or arreſt does not *neceſſarily* terminate in a total loſs.

On the other hand, a title to reſtitution, upon a recapture, does not neceſſarily, and at all events, deprive the inſured of the right to abandon: For if, in conſequence of the capture, the voyage be loſt, or not worth purſuing; if the ſalvage be very high; if farther expence be neceſſary, and the inſurer will not undertake at all events to pay it, the inſured may abandon.—The rule is, that, if the thing inſured be recovered before any loſs is paid, the inſured is entitled to claim as for a total, or a partial loſs, according to the final event; that is, according to the ſtate of the caſe at the time he makes his claim. There is no veſted right to a total loſs, till the inſured, having a right to abaudon, elects to do ſo; for he is only

Neither does a recapture neceſſarily deprive the inſured of the right to abandon.

If the thing inſured be recovered before the loſs is paid, the loſs will be total or partial, according to the final event.

(*a*) Vid. Lord *Mansfield's* judgment in *Kulen Kemp* v *Vigne*, 1 T. R. 304, ſup. 130.——(*b*) By the law of *France*, the ſhip being once captured, it is always a total loſs; and the legal effect of it is preſumed to continue, though the ſhip be releaſed or retaken. The recovery of the goods inſured is only for the account of the inſurer, who cannot, under pretence that they are arrived at their port of deſtination, refuſe the abandonment. The recovery of the goods is merely in nature of ſalvage. *Emerig.* tom. 2, p. 188.

entitled to an indemnity for his loſs as it ſtands at the time of the action brought, or offer to abandon.

But if, after a loſs has been paid, the thing inſured be recovered, the inſurer cannot oblige the inſured to refund the money he has received; but he ſhall ſtand in the place of the inſured, and ſo no injuſtice is done.

But if, after a loſs has been paid, the thing inſured be recovered, the inſured ſhall not be obliged to refund

Though there be a recapture, yet, if the voyage be loſt, the inſured may abandon.

The two following caſes are cited as examples to ſhew that though a captured ſhip be recaptured, yet if the voyage be loſt, the loſs will be total, and the inſured will have a right to abandon.

Pringle v. *Hartley*, in Cuan. 1744, 3 *Atk.* 195.

The firſt was the caſe of a ſhip inſured from *London* to *Bermudas* and *Carolina*, taken by a *Spaniſh* privateer, retaken by an *Engliſh* privateer, and carried into *Boſton*, in *America*, where no perſon appearing to give ſecurity, or anſwer for the ſalvage, ſhe was condemned and ſold in the court of admiralty there. The recaptors had their moiety of the proceeds, and the ſurplus remained in the hands of the officers of the court.—An action at law was brought upon the policy by the inſured, who obtained a verdict againſt the underwriter for a total loſs. The underwiter filed a bill in Chancery, and moved for an injunction to ſtay the proceedings at law, inſiſting that the inſured ought not to recover more than the ſalvage, which, in this caſe, was a moiety, as the ſtat. 13 *G.* II. c. 4, § 18, gave the thing ſaved, ſubject to ſalvage, to the owner, who was entitled to receive it from the officers of the admiralty court at *Boſton*. The inſured, in his anſwer, ſwore that he had *offered*, and was then willing, to *relinquiſh* his intereſt to the inſurers in the benefit of the ſalvage, and would give them a letter of attorney to receive it.—Lord Chancellor *Hardwicke* determined that there was no ground for an injunction in this caſe.—He ſaid:—"At the time of the trial, the inſured knew that the ſhip was retaken.—The queſtion ariſes on the ſtat. 13 *G.* II. with regard to the ſalvage. It has been ſaid that there ought to be only half the loſs recovered on the policy; and, as to that, the act has made great alteration in the law of nations, with reſpect

A ſhip is taken, and retaken, and ſold in a diſtant country to pay the ſalvage, and the reſidue of the proceeds remains in the court of admiralty there:—The inſured may abandon, and recover as for a total loſs.

to

to recaptures. The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the recaptor, as if it had been originally the ſhip of the enemy; but, by the act, the recapture reveſts the property in the owner. If there had been a ſalvage, it muſt have been deducted out of the money recovered under the policy; but if none came to the hands of the inſured, the jury could not take notice of it. It is uncertain whether the inſured will receive any thing or not: And if any thing be recovered, he muſt have an allowance for his expences in recovering it. Therefore, being willing to *relinquiſh his intereſt* in the ſalvage, he ought to have recovered *the whole money inſured*. It would be miſchievous if it were otherwiſe; for then, upon a recapture, the inſured would be in a worſe ſituation than if the ſhip were totally loſt."

Goſs v. *Withers*, 2 *Bur.* 683.

A ſhip, after throwing part of her cargo overboard in a ſtorm, and being diſabled from proceeding on her voyage till refitted, is captured and her crew taken out; but after being eight days in poſſeſſion of the enemy, is recaptured and carried into an *Engliſh* port, upon which the inſured give notice to abandon. Before the ſhip can be refitted, the reſt of the cargo is ſpoiled: —This is a total loſs, and the inſured may abandon.

In the ſecond caſe, two inſurances were made, the one on the ſhip *David* and *Rebecca*, the other on goods on board, 'At and from *Newfoundland* to her port of diſ-'charge in *Portugal* or *Spain*, without the *Streights*, or '*England*.'—In an action upon the former policy, the plaintiff declared upon a total loſs by capture; upon the latter, the declaration alledged that divers quantities of fiſh and other merchandizes, were put on board; and averred that one fourth of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo; after which *jettiſon*, the ſhip and the remainder of the goods, were taken by the *French*.—It appeared on the trial, that the ſhip was taken on the 23d of *December* 1756; and the maſter, mates, and all the ſailors, except an apprentice and a landman, were taken out of her and carried to *France*. The ſhip remained in the hands of the *French eight days*, and was then retaken by a *Britiſh* privateer, and brought into *Milford Haven* on the 18th of *January*; and *immediate notice* was given by the inſured to the underwriters, with an offer to abandon. Before the capture, the ſhip, in a violent ſtorm, was ſeparated from her convoy, and ſo diſabled as to be incapable of proceeding on her voyage, without going into ſome port to refit. Part of her cargo

was thrown overboard in the ſtorm, and the reſt ſpoiled, while the ſhip lay at *Milford Haven*, after the offer to abandon, and before the ſhip could be refitted.—Upon this caſe, two queſtions were made; 1ſt, Whether this was a loſs by capture for which the inſurers were liable. 2dly, Whether, under all the circumſtances, the inſured had a right to abandon the ſhip to the inſurers after ſhe was carried into *Milford Haven*.—The court, upon great conſideration, were clearly of opinion, that the loſs was total by the capture; and that, after the voyage was defeated, the right which the owner had to obtain reſtitution of the ſhip and cargo, paying ſalvage to the recaptors, might be abandoned to the inſurers, after ſhe was brought into *Milford Haven*.—Lord *Mansfield* delivered the opinion of the court. The deciſion of the firſt point has been already mentioned in its proper place (*a*). Upon the ſecond point, his lordſhip ſaid,—"The ſingle queſtion upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon on the 18th of *January*. The loſs and diſability were in their nature total at the time they happened. During eight days the plaintiff was entitled to be paid by the inſurer, as for a total loſs; and, in the caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: *Half the value muſt be paid for ſalvage*. The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter-party was diſſolved. The freight, except in the proportion of the goods ſaved, was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved might not be worth the expence neceſſarily attending it. The ſubſequent title to reſtitution ariſing from the recapture, at a great expence (*b*), of a ſhip diſabled from purſuing her

A title to reſtitution ariſing from recapture, cannot take away a veſted right to abandon, if the ſhip be unfit to perform the voyage.

(*a*) Sup. 126. — (*b*) By 29 *G.* II. c. 34. § 8. a moiety of the value of the captured ſhip was given to privateers, if the prize was above 60 hours in the poſſeſſion of the enemy. But now by 43 *G.* III. c. 160, § 39, the ſalvage in all caſes of recapture, by private ſhips, is fixed at one-eighth.

voyage,

voyage, cannot take away a right veſted in the inſured at the time of the capture. But, becauſe he cannot recover for any more than the loſs he has ſuſtained, he muſt abandon what may be ſaved. The better opinion of the books ſays, — *Sufficit ſemel extitiſſe conditionem, ut beneficium aſſecuratori, de amiſſione navis; etiam quod poſtea ſequatur recuperatio: Nam per talem recuperationem non poterit præjudicari aſſecuratio* (*a*).' I cannot find a ſingle book, ancient or modern, which does not ſay that, in caſe of a ſhip *being taken*, the inſured may demand as for a total loſs and abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of arreſt, or an embargo, by a prince not an enemy (*b*). Poſitive regulations in different countries, have fixed a preciſe time before the inſured ſhould, in that caſe, be at liberty to abandon. The fixing a preciſe time proves the general principle. Every argument holds ſtrongly in the caſe of the other policy, with regard to the goods. The cargo was, in its nature, periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as abſolutely defeated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved. No capture by the enemy can be ſo total a loſs as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by the ſtat. 29 *G.* II. c. 34, § 24, if an *Engliſh* ſhip retake at any time, before the condemnation or after, the owner is entitled to reſtitution, upon ſtated ſalvage. This chance does not ſuſpend the demand upon the inſurer for a total loſs: But juſtice is done by putting him in the place of the inſured, in caſe of a recapture. In queſtions on policies, the nature of the contract, as an indemnity and nothing elſe, is always liberally conſidered. There might be circumſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: As if a ſhip were taken, and, in a few days, eſcaped entire, and purſued her voyage. There are circumſtances

The inſured may abandon upon a mere arreſt or embargo by a prince not an enemy.

(*a*) *Recuyl* n. 66. — (*b*) Vid. ſup. ch. 12, § 5.

under

under which it would be deemed an average loſs: If a captured ſhip be immediately ranſomed (*a*) by the maſter, and purſue her voyage: there the money paid is an average loſs. And in all caſes the inſured may chuſe not to abandon (*b*). In the ſecond part of the uſages and cuſtoms of the ſea, (a tranſlation from the *French*), a treatiſe is inſerted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, it is added, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or not worth the freight, to purſue it (*c*)." I know that, in late times, the privilege of abandoning has been reſtrained for fear of letting in frauds: And the merchant cannot elect to turn what, at the time when it happened, was in its nature, but an average loſs, into a total one, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened; and continued total, as to the deſtruction of the voyage. Nothing could be recovered, but upon payment of more than half the value, including the coſts. What could be ſaved of the goods might not be worth the freight for ſo much of the voyage as they had gone when they were taken. The cargo, from its nature, muſt have been ſold where it was brought in. The loſs, as to the ſhip, could not be eſtimated, nor the ſalvage of half be fixed, by a better meaſure than a

The inſured is in no caſe *obliged* to abandon.

And he cannot, merely by abandoning, turn a partial into a total loſs.

(*a*) Since this judgment was delivered, the ranſoming of ſhips captured by the enemy has been prohibited by ſtat. 22 *G.* III. c. 35. ſup. 504.——(*b*) *Le Guidon*, ch. 7, art. 1, ſays that abandonment depends on the will of the inſured, who may reſort to it as an *extreme remedy* ——(*c*) The paſſage in *Le Guidon* to which his lordſhip alludes, c. 7, § 1, is in theſe words: "*Il eſt en liberté au marchand chargeur faire* delais *à ſes aſſureurs, c'eſt à dire, quitter et delaiſſer ſes droits, noms, raiſons, et actions, de la proprieté qu'il a en la marchandiſe chargée, dont il eſt aſſeuré, lors, et quand il advient naufrage du tout ou de partie, ou bien avarie qui excéde ou endommage la moitié de la marchandiſe, quand il y a priſe d'amis ou d'ennemis, arreſt de prince, ou autre tel diſtourbier en la navigation; ou telle empirance en la marchandiſe, qu'il n'y ait moyen l'avoir fait naviger à ſon dernier réſte,* ou qu'elle ne valut le frêt, ou peu de choſe d'avantage."

ſale.

ſale. In ſuch a caſe, there is no colour to ſay that the inſured might not diſentangle himſelf from unprofitable trouble and further expence, and leave the inſurer to ſave what he could. It might as well be argued that if a ſhip which had ſunk, was weighed up again at a great expence, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved."

It is not becauſe a ſhip has once been captured, that the inſured may abandon at any time afterwards.

In the above caſe Lord *Manſfield* declared, "*that he could not find a ſingle book, ancient or modern, which did not ſay that, in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and abandon.*"—The unqualified terms in which this is expreſſed, ſoon gave riſe to a notion that the immediate conſequence of a capture was a *change of property* in the thing inſured, and that this gave the inſured a veſted right to a total loſs, with liberty to abandon when he pleaſed; and that this right could not be diveſted by any ſubſequent event.—That Lord *Manſfield* did not mean to be thus underſtood is obvious from the whole of his judgment in that caſe: But another caſe ſoon after occurred which afforded him an opportunity of explaining his own meaning in that judgment, and of aſcertaining and ſettling thoſe principles of law which have governed all the caſes to which they were applicable, from that time to the preſent.

If the thing inſured be recovered before any loſs is paid, the inſured is only entitled to a partial or a total loſs, according to the final event.

In this caſe it was ſettled, after ſolemn argument, and upon great conſideration, that if the thing inſured be recovered before any loſs is paid, the inſured can only be entitled to a total or a partial loſs, according to the final event. This agrees with *Roccus* who puts this queſtion: —*Aſſecurator qui jam ſolvit æſtimationem mercium deperditarum, ſi poſtea dictæ merces appareant et recuperatæ ſint, an poſſit cogere dominum ad accipiendas illas, et ad reddendam ſibi æſtimationem quam dedit?*—To this queſtion he anſwers thus: *Diſtinguè: Aut merces aut aliqua pars ipſarum appareant, et reſtitui poſſint ante ſolutionem æſtimationis; et tunc tenetur dominus mercium illas recipere, et pro illa parte mercium apparentium liberabitur aſſecurator: Nam qui tenetur ad certam quantitatem reſpectu certæ ſpeciei, dando illam, liberatur. Et etiam, quia contractus aſſecurationis eſt conditionalis, ſcilicet, ſi merces deperdantur: Non autem dicuntur deperditæ, ſi poſtea reperiantur. Verum, ſi merces non appareant*

in illa priſtina bonitate, aliter ſit æſtimatio; non in totum, ſed prout tunc valent. Aut vero poſt ſolutam æſtimationem ab aſſecuratore compareant merces, et tunc eſt in electione mercium aſſecurati, vel recipere merces vel retinere pretium (a).

Hamilton v. *Mendes*, 2 *Bur.* 1198, 1 *Bl.* 276.

A ſhip is captured, and all the hands but the mate and another man taken out of her. After 17 days, the is recaptured and ſent into an *Engliſh* port, where ſhe arrives a month after the capture:—The voyage not being loſt, the inſured ſhall not be allowed to abandon after the ſhip's arrival.

The caſe above alluded to, was an inſurance on the ſhip *Selby*, *valued at* 1200*l.* and goods on board, from *Virginia* to *London*.—The ſhip ſailed on the 28th of *March* 1760, from *Virginia* for *London*, and on the 6th of *May* was captured by a *French* privateer. The captain and ſix men were taken out of the ſhip, and only the mate and one man left on board. The *French* put a prize-maſter and ſeveral men on board to carry the ſhip to *France*; but in the way thither, ſhe was retaken on the 23d of *May* and ſent into *Plymouth*, where ſhe arrived the 6th of *June*. The plaintiff, at *Hull*, as ſoon as he was informed of what had befallen his ſhip, wrote on the 23d of *June* to his agent in *London*, with directions to abandon.—The agent, on the 26th of *June*, acquainted the defendant with the offer to abandon, to which the defendant anſwered, 'that he did not think himſelf bound to take to 'the ſhip, but was ready to pay the ſalvage, and all 'other loſſes and charges that the plaintiff had ſuſtained 'by the capture.'—On the 19th of *Auguſt* the ſhip, which had ſuſtained no damage by the capture, was brought to *London* by order of the owners of the cargo and the recaptors, and the whole cargo delivered to the freighters, who paid the freight without prejudice.—The queſtion on this caſe was, whether the plaintiff, on the 26th of *June*, had a right to abandon, and to recover as for a total loſs?—The court determined that he had no right to abandon, and that he could recover as for a partial loſs only.—Lord *Mansfield*, in delivering the opinion of the court ſaid,—"The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, *that, by the capture, the ſhip became wholly loſt to him.* The general queſtion is, whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being firſt apprized of any accident

(a) *Roccus*, h. t. n 9, 50.

having

having happened, had only, in truth, ſuſtained a *partial loſs*, ought to recover as for a *total loſs*. In ſupport of the affirmative, the counſel for the plaintiff inſiſted upon the four following points: 1. That, by the capture, *the property was changed*, and therefore the loſs total for ever; 2. That if the property was not changed, yet the *capture* was a total loſs; 3. That when the ſhip was brought into *Plymouth*, particularly on the 26th of *June*, the recovery was not ſuch as, in truth, changed the total into an average loſs; 4. That, ſuppoſing it did, yet the loſs having once been total, a right *veſted* in the inſured to recover the whole, upon abandoning; which right could never afterwards be *diveſted*, or taken from him, by any ſubſequent event.—As to the *firſt point*: If the change of property was at all material, as between the inſurer and the inſured, it would not be applicable to the preſent caſe; becauſe, by the marine law received and practiſed in *England*, there is no change of property, in the caſe of a capture, till condemnation; and now by the act of parliament (*a*), in caſe of a recapture, the *jus poſtliminii* continues for ever. Many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was, or was not, ſo changed by the capture, as to transfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor or vendee, ought never to be the rule of deciſion, as between the inſurer and inſured, upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree, upon the *ſecond point*, that, by the capture, *while it continued*, the ſhip was totally loſt; but it muſt be admitted that the property, in caſe of recapture, never was changed, but returned to the former owner.—The *third point* depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not *neceſſarily* follow, that, becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be abſolutely loſt, or not worth purſuing: If the ſal-

The property is not changed by capture, till condemnation But now the *jus poſtliminii* continues for ever.

While the ſhip is in the hands of the enemy, ſhe is conſidered as totally loſt; but the property reveſts upon a recapture.

(*a*) 29 G. II. c. 34. § 24.

In what cafes a loſs may be ſaid to be total.

vage be very high: If further expence be neceſſary: If the inſurer will not engage, at all events, to bear that expence, though it ſhould exceed the value, or fail of ſucceſs: Under theſe, and many other like circumſtances, the inſured may diſentangle himſelf and abandon, notwithſtanding there was a recapture. The *Guidon* (*a*), amongſt other inſtances of a total loſs, where the inſured may abandon, ſays, "*If the damage exceed half the value of the thing inſured; or if the voyage be loſt, or ſo interrupted that the purſuit of it is not worth the freight.*" But, in the preſent caſe, the voyage was ſo far from being loſt, that it had met with only a ſhort temporary obſtruction; the ſhip and cargo were both ſafe; the expence incurred did not amount to near half the value; and when the offer was made to abandon, the inſurer undertook to pay all charges and expences which the inſured ſhould be put to by the capture. The only argument to ſhew that the loſs had not, upon the recapture, ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property *returns* to the owner, pledged to the recaptors for the amount of the ſalvage. Upon paying this he is entitled to reſtitution. The recaptor in this caſe had no right to ſell the ſhip. If they had differed about the value, the court of admiralty would have ordered a commiſſion of appraiſement: It was the intereſt of all parties that the ſhip ſhould forthwith proceed to *London*. Had the recaptor oppoſed it, or affected delay, the court of admiralty would have made an order for bringing her to her port of delivery, upon reaſonable terms. Therefore it is clear that, on the 26th of *June*, the ſhip had ſuſtained no other loſs than a ſhort temporary obſtruction, and a charge which the defendant offered to pay.—As to the *laſt point*: The plaintiff's demand is for an indemnity. His action, then, muſt be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of *indemnity*,

Upon a recapture the property returns to the original owner, pledged for the ſalvage.

Though there have at one time been a total loſs, the inſured cannot abandon after the *final event* has determined it to be only a partial loſs.

(*a*) Ch. 7, § 1.

to

to recover as for a total loſs, when the final event has determined that the damnification is, in truth, an average loſs. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity, in the ſame degree. It is a contradiction in terms to ſay that an action will lie for an indemnity, when, upon the whole event, no damage has been ſuſtained."—To illuſtrate this, and to ſhew that, by the common law, the injury being repaired before the action was brought, is an anſwer to the action, he put the caſe of an action of waſte brought againſt a tenant, after he had repaired (*a*); and of an action brought by a ſurety ſued to judgment, againſt his principal, after the principal had paid the debt and coſts, and entered ſatisfaction on record. He then ſaid;—"But, in the preſent caſe, the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is only fictitious and not founded in truth: For the inſured is not obliged to abandon, in any caſe. He has an election. No right can veſt, as for a total loſs, till he has made that election. He cannot elect before advice is received of the loſs; and if that advice ſhew the peril to be over, and the thing inſured in ſafety, he cannot elect at all; becauſe he has no right to abandon when the thing is ſafe. Writers upon the marine law are apt to embarraſs general principles with the poſitive regulations of their own country: But they ſeem all to agree that, if the thing be recovered before the money is paid, the inſured can only be intitled according to the final event (*b*).—In the caſe of *Spencer* v. *Franco* (*c*), though upon a *wager policy*, the loſs was held not to be total, after the return of the ſhip in ſafety; though ſhe had been ſeized, and long detained by the King of *Spain*, in a time of actual war.—In the caſe of *Fitzgerald* v. *Pole* (*d*), though upon a wager policy, the majority of the Judges, and the Houſe of Lords, held there was no total loſs; the ſhip having been reſtored before the end of the four months, the time for

There is no *veſted* right to recover as for a total loſs, till the inſured, having a right to abandon, elects to do ſo.

If a ſhip be recovered after a long detention, it is not a total loſs, even upon a wager policy.

(*a*) Vid. Co. Lit. 53, a.———(*b*) Vid. *Roccus*, Not. 50, ſup. 565.———(*c*) Sup. 514.———(*d*) 5 Bro. Parl. Ca. 131, inf.

which

which ſhe was inſured.—The preſent attempt is the firſt that was ever made to charge the inſurer, as for a total loſs, upon an *intereſt* policy, after the thing was recovered: And it is ſaid, the judgment in *Goſs* v. *Withers* gave riſe to it."—Here he recapitulated the grounds of the judgment in that caſe (*a*), and proceeded thus,—"But it is ſaid that though the caſe of *Goſs* v. *Withers* was entirely different, ſome part of the *reaſoning* warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, that, as between the inſurer and inſured, the contract being an indemnity, the *truth* of the facts ought to be regarded; and therefore there might be a total loſs by a capture, which could not operate a change of property; and a recapture ſhould not relate by fiction, like the *Roman jus poſtliminii*, as if the capture had never happened, unleſs the total loſs was in truth recovered. This reaſoning proved, *à converſo*, that if the thing, *in truth* was ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed (*b*), 'that there is no book, 'ancient or modern, which does not ſay that, in caſe of 'the ſhip being taken, the inſured may demand as for a 'total loſs, and abandon.' But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, *continue to the time of abandoning, and bringing the action.* The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."—Here he read ſeveral paſſages from his argument in *Goſs* v. *Withers*, which is fully ſet forth in the foregoing account of that caſe, and then proceeded;—"From this way of reaſoning it by no means followed, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, the inſured might abandon. But without dwelling longer upon principles or autho-

A paſſage in the judgment of *Goſs* v. *Withers*, explained.

(*a*) Sup. 568.——(*b*) Vid. ſup. 569.

rities,

rities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould *deſire* to abandon, in a caſe circumſtanced like the preſent, but for one of two reaſons; either becauſe he has *over-valued*; or becauſe the *market has fallen* below the original price. The only reaſons which can make it the intereſt of the party to *deſire* to abandon, are concluſive againſt allowing it. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon; and he can only deſire it becauſe he has over-valued. This was avowed upon the firſt argument; and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity than the *value* of the loſs; and the inſured ought never to receive more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But, upon *principle*, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of the common law: Much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the fact. The property, and daily negotiations of merchants ought not to depend upon ſubtleties and nicetles; but upon rules eaſily learned and eaſily retained; becauſe they are the dictates of common ſenſe, drawn from the truth of the caſe. If the queſtion depend upon the fact, every man can judge of the nature of the loſs, before the money be paid: But, if it depend upon *ſpeculative refinements*, from the law of nations, or the *Roman jus poſtliminii*, concerning the change, or veſting, of property; no wonder merchants are in the dark, when *doctors* have differed upon the ſubject from the beginning, and have not yet agreed.—To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that the point here determined is, *That the plaintiff upon a policy can only recover an indemnity, according*

When the ſhip is ſafe and the voyage not loſt, the inſured ought not to be permitted to abandon.

The inſurer ought never to pay leſs than the *value* of the loſs, nor the inſured receive more

The inſured can only recover an indemnity for

his loſs at the time of the action brought, or offer to abandon.

according to the nature of his caſe, at the time of the action brought, or, at moſt, at the time of his offer to abandon. We give no opinion, how it would be, in caſe the ſhip and goods were reſtored in ſafety between the offer to abandon and the action brought, or between the commencement of the action and the verdict: And particularly I deſire that it may not be inferred, that in caſe the ſhip or goods ſhould be reſtored, *after the money is paid as for a total loſs*, the inſurer could compel the inſured to refund the money and take the ſhip or goods. That caſe is totally different from the preſent, and depends throughout, upon different reaſons and principles. Here, the event had fixed the loſs to be an average loſs only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident; conſequently before he could make an election. Therefore, under theſe circumſtances, we are of opinion that he cannot recover for a total loſs, but for an average loſs only; the amount of which is aſcertained by the jury.—The judgment muſt be entered up as for the average loſs ſtated in the caſe; viz. 10l. *per cent.*"

If, after a total loſs has been paid, the ſhip be reſtored, the inſured ſhall not be obliged to refund.

If, upon a recapture the captain ſell the ſhip and cargo, as being the beſt to be done for all concerned; the inſured may abandon.

The following caſe will ſhew that if, upon a recapture, the captain find that the voyage cannot be purſued, and, acting fairly for the benefit of all concerned, he ſell the ſhip and cargo to pay the ſalvage, and thereby put an end to the voyage; the inſured may abandon, and recover as for a total loſs.

Miller v. *Fletcher*, *Doug* 219.

A ſhip and freight were inſured from *Montſerrat* to *London*:—The ſhip was taken on her voyage on the 23d of *May* by two *American* privateers, who took the captain and all the crew, and part of the cargo, (which conſiſted of ſugars), out of her; and alſo took away the rigging. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking poſſeſſion of the ſhip, found that part of what had been left on board of the cargo, was waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was leaky, and could not be repaired without unloading her entirely. The owners had no ſtorehouſe at *New York*. No ſailors were to be had there; and the only

A ſhip and goods are captured and recaptured, and put in poſſeſſion of the captain, who diſpoſes of both and puts an end to the voyage; and in ſo doing, acts to the beſt of his judgment for the benefit of all concerned: The inſured may *abandon*, and demand as for a *total loſs*.

method

method he had of paying the ſalvage, was by ſale of the ſhip or part of the cargo. He did not know of the inſurance. The expence of repairing the ſhip would have exceeded the freight by more than 100l. There was an embargo on all veſſels at *New York* till the 27th of *December*, and his ſhip ought to have arrived at *London* in *July* Upon conſulting with his friends at *New York*, he reſolved to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold and paid for. The ſhip was alſo contracted for; but the perſon who agreed to buy her ran away; and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and informed the plaintiff of what he had done. The plaintiff immediately claimed from the underwriters as for a total loſs, and offered to abandon.—The underwriters reſiſted this claim. The inſured brought an action on the policy, claiming as for a total loſs. The defendant inſiſted that it was only an average loſs.—Lord *Mansfield*, who tried the cauſe, told the jury, that if they were ſatisfied *that the captain had done what was beſt for the benefit of all concerned*, they muſt find as for a total loſs. The jury found a verdict according to this direction; and upon a motion for a new trial, the court were clearly of opinion that the plaintiff had a right to *abandon*, and claim as for a total loſs.—Lord *Mansfield* ſaid;—"On the trial of this cauſe, it did not appear to me that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one till the facts were aſcertained; and when aſcertained, it would have been impoſſible to ſtate them in any way which could have left a doubt on the law. It was not contended that a capture *neceſſarily* amounts to a total loſs, as between inſurer and inſured; nor, on the other hand, that, on a capture and recapture, there may not be a total loſs, though there remains ſome material tangible part of the ſhip and cargo. Neither was it contended that the captain has an arbitrary power, by his own act, to make the loſs either partial or total, as he pleaſes. The queſtion is ſimply this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a *total obſtruc-*

A capture does not neceſſarily amount to a total loſs; nor does a recapture prevent its being total.

tion of the voyage, or only a *partial ſtoppage*, as in the caſe of *Hamilton* v. *Mendez* (*a*). In that caſe, and in *Goſs* v. *Withers* (*b*), great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured *had notice*, at the time of the offer *to abandon*, and at the time of the *action brought*. No caſe ſays, that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. The caſes where the inſured may abandon are, 'If the voyage be loſt, or not worth purſuing;—If the 'ſalvage be high;—If further expence be neceſſary;—'If the inſurer will not, at all events, undertake to pay 'that expence (*c*), &c.' Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew taken out, and part of the cargo and the rigging alſo taken away. When the ſhip was retaken and brought to *New York*, it ſtill continued a total loſs. Neither the inſured nor the inſurers, had any agent in the place. The court of admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice and offered to abandon, and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this, is, that the loſs was total, indeed, but the captain made it ſo by his improper conduct; for that, on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But was this defence true in fact? The captain, when he came to *New York*, had no expreſs order, but he had an implied authority, from both ſides, to do what was right and fit to be done, as none of them had agents in the place. And for the conſequences of whatever it was right for him to have done, if it had been his own ſhip and cargo, the underwriter muſt anſwer; becauſe this is within the contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1. As to the *cargo*: According to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On

In what caſes the inſured may abandon.

The captain has an implied authority to do the beſt he can for the benefit of all concerned, and the inſurer is bound by his acts.

(*a*) Sup. 572.——(*b*) Sup. 567.——(*c*) Vid. ſup. 562.

the

the capture, part had been taken out, ſome had been waſhed overboard, ſome damaged, and the whole, from the leakineſs of the veſſel, in a periſhable ſtate. There were no ſtore-houſes, nor could the ſhip proceed in the ſtate ſhe was in. The crew was gone, and an embargo laid on till *December*. What! ſhall a cargo, which was intended to arrive at *London* in *July*, be kept in a periſhable ſtate at *New York*, in a leaky veſſel, till *December*? 2. As to the *ſhip*: It was certainly better to ſell her than to bring her to *London*. There was no crew belonging to her, and ſhe had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The queſtion is, what did the owner ſuffer by the capture; and it appears that he ſuffered ſo much that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to the one ſide or the other. I left it to the jury to determine whether what the captain had done, was *for the benefit of the concerned*. If they had found that it was, in words, where would have been the queſtion of law (*a*)?"

If the captain purchaſe the ſhip from the captors for account of his owners; the money paid is only a partial loſs.

So, if the ſhip be ſold by the captors, and the captain acting as agent for the owners, purchaſe the ſhip on their account; this ſhall be conſidered as a recovery of the ſhip for the owners, and the money thus paid, as ſalvage; and if the voyage can be proſecuted, this is only a partial, and not a total, loſs.

M'Maſters v. *Shoolbred*, 1 Esp. Rep. 237.

Thus.—A ſhip inſured for ſix months, was captured and carried into *Charleſtown*, where ſhe remained upwards

(*a*) In *Plantamour* v. *Staples*, ſup. 169. Mr. Juſtice *Buller* adopts this doctrine, viz. that the inſurers are bound by the acts of the captain, when he does what *he deems beſt* for the benefit of all concerned.

of a month, and then was ſold by the captors, and purchaſed by the captain for account of the original owners.—In an action on the policy, the defendant paid 60l. *per cent.* into court, as for a partial loſs.—The plaintiff contended, that the ſhip having been captured and ſold by the captain, after ſhe had been a month in their poſſeſſion, this was a total loſs.—Lord *Kenyon*, who tried the cauſe, held that this was only to be conſidered as a partial loſs, and that the owners could not abandon. He conſidered the captain as agent for the owners, recovering the veſſel upon their account, and the price as a kind of ſalvage, the amount of which would be the loſs ſuſtained, and which only conſtituted an average loſs. He admitted, however, that when the ſhip had been captured, and was carried into port, in the enemy's poſſeſſion, the inſured might, at that period, have abandoned. But not having abandoned till after the ſhip was recovered, they could now only go as for a partial loſs.—The jury found a verdict according to this direction.

Having laid before the reader the authorities upon queſtions of abandonment upon loſſes by capture and arreſt of princes, we will now proceed to conſider,

2. *Of the right of abandoning in other caſes.*

Shipwreck is conſidered as a total loſs.

Shipwreck is generally a total loſs. What may be ſaved of the ſhip or goods is ſo uncertain, and depends ſo much on accident, that the law cannot diſtinguiſh this from the abſolute deſtruction of the whole. The wreck of the ſhip may remain and may be ſaved, but the ſhip is loſt. A thing is ſaid to be deſtroyed when it is ſo broken, disjointed, or otherwiſe injured, that it no longer exiſts in its original nature and eſſence. So, the goods may remain; but if no ſhip can be procured in a reaſonable time, to carry them to their place of deſtination, the voyage is loſt, and the adventure fruſtated.

But a ſtranding is not, of itſelf, deemed a total loſs.

But the mere *ſtranding* of the ſhip is not, of itſelf, deemed a total loſs, ſo as to entitle the inſured immediately to abandon. If, by ſome fortunate accident, by the exertions of the crew, or by any borrowed aſſiſtance, the ſhip be got off and rendered capable of continuing her voyage,

voyage, it is not a total loſs, and the inſurers are only liable for the expences occaſioned by the ſtranding. It is only where the ſtranding is followed by *ſhipwreck*, or in any other way renders the ſhip incapable of proſecuting her voyage, that the inſured is entitled to abandon (*a*).

No partial loſs, however great, can be turned into a total loſs.

It is a rule that, to entitle the inſured to abandon, there muſt have been, at ſome period of the voyage inſured, or during the continuance of the riſk, a total loſs; and the following caſes will ſhew that no partial loſs, however great, occaſioned by the perils of the ſea, can be turned into a total loſs.

Cazalet v. *St. Barbe*, 1 T. R. 187.

An inſurance was made on the ſhip *Friendſhip* from *Wyburgh* to *Lynn*.—In an action on the policy, the defendant pleaded a tender of 48l.—The plaintiff claimed as for a total loſs, and upon the trial of the cauſe, it appeared that the ſhip had ſuffered ſo much in her voyage, that when ſhe arrived at *Lynn*, ſhe was not worth repairing. The damage, however, ſuſtained by the ſhip, did not exceed 48 *per cent.* the ſum which the defendant had paid into court upon his plea of tender.—Upon this caſe the defendant inſiſted that this was a *partial*, and not a total, loſs, and that therefore the plaintiff had no right to abandon.—The court were clearly of opinion that the owner cannot abandon, but in the caſe of a total loſs, and that they could not determine that there had been *a total loſs*, when the jury found that there was only a loſs of 48l. *per cent.*—Mr. Juſtice *Aſhurſt* ſaid, "It will be making the inſurers anſwerable for the goodneſs of the ſhip, if they are held liable for more than 48l. *per cent.* It is ſtated that the ſhip was not worth repairing; but *non conſtat* that, if the ſhip had not received any damage during the voyage, ſhe would have been worth repairing: And though ſhe was not in a ſound ſtate, yet ſhe had been 24 hours in ſafety; and the jury having aſcertained the amount of the damage ſhe has ſuſtained, I cannot ſay that the plaintiff ought to recover more."—Mr. Juſtice *Buller* ſaid, "Nothing can be better eſtabliſhed than that the *owner* of a ſhip can only abandon in the caſe of a total loſs hap-

A ſhip performed her voyage, but was ſo damaged as not to be worth repairing; yet, as the damage was only eſtimated at 48 *per cent*, this is not a total loſs, and the inſured cannot abandon.

(*a*) Vid. *Emerig.* tom. 2, p. 180.

pening *at ſome period or other of the voyage*; which cannot have happened in this caſe, as the jury have expreſsly found thar the loſs amounted to 48l. *per cent.* In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, *as between the inſurer and the inſured*, was a total loſs. The true way of conſidering this caſe is, that it was an inſurance *on the ſhip, for the voyage*; and if either the ſhip or the voyage be loſt, it will be a total loſs; but here neither was loſt. The caſe of *Hamilton* v. *Mendez* (*a*) is deciſive."

Furneaux v. *Bradley*, B. R. *Eaſt* 20 G. III. *Park* 166

A ſhip, inſured for ſix months, receives an injury *within the time*; and the captain being unable to get her repaired, tells her, *after the time*: This is only a partial loſs.

Thus:—The ſhip *Prince of Wales* was inſured, 'In 'port or at ſea, for ſix months from the 18th of *July* '1777.'—She was in government ſervice, and bound from *Cork* to *Quebec*. She arrived there; but the ſeaſon being far advanced before ſhe was ready to return, ſhe was removed into the baſon; from whence on the 19th of *November* ſhe was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined into, till the *April* following, after the expiration of the policy. She was then found to be bulged, and much injured, but not irreparably ſo. In the progreſs of the repair, difficulties aroſe for want of materials; and the captain, after conſulting the merchants and agent in the place, ſold her. An account of the loſs was made up, charging the inſurers for the whole amount, and crediting them for the money for which the ſhip was ſold, as ſalvage.—Lord *Mansfield*, at the trial, ſaid,—"The great point in the caſe is, whether there be a total loſs occaſioned by this accident. It is a new queſtion, upon which I ſhall reſerve a caſe for the opinion of the court."—A caſe being reſerved, the court, after argument, were of opinion, that the ſhip ſhould be conſidered as *damaged*, on the 19th of *November*, but not *totally loſt*.—Lord *Mansfield* ſaid, the juſtice of the caſe ſeemed to be that the loſs in *November* ſhould be taken as an *average*, not as a *total* loſs.

Fitzgerald v. *Pole*, 5 *Bro.* Parl. Ca. 131; *Willes*, 641.

A privateer, inſured for four months *free from average*, is]

So, where the *Good Fellow* privateer was inſured, 'At 'and from *Jamaica* on a cruiſe for four months, valued

(*a*) Sup. 572.

'at

'at 1000l. without further account, *and free from average.*' —Upon a ſpecial verdict it appeared, that while the privateer was on her cruiſe, and within the four months, the crew mutinied againſt the captain and his officers, and by force carried the ſhip to *Jamaica*, and, before her arrival there, by force, ſeized the boat, fire-arms, and cutlaſſes, carried them off, and deſerted the ſhip, whereby the voyage and cruiſe were prevented and loſt for the remainder of the four months; that the ſhip arrived at *Jamaica*, but not till after the end of the four months.—Upon this caſe the King's Bench gave judgment for the plaintiff.—Upon a writ of error, the Exchequer Chamber unanimouſly reverſed that judgment; and the Houſe of Lords confirmed the judgment of reverſal, being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total loſs; and the ſhip being found, by the ſpecial verdict to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs (*a*).

forced into port by a mutiny of the crew, but is in ſafety at her port after the four months are expired:—The inſured can recover for no loſs;—not for an average loſs, becauſe the inſurance was *free from average*; and not for a *total loſs*, becauſe it was only an average loſs.

If, by any accident or misfortune, the ſhip be prevented from proceeding on her voyage, and the voyage be thereby loſt; this is a total loſs, not only of the ſhip and freight, but alſo of the cargo, if no other ſhip can be procured to carry it to its port of deſtination.

But if the voyage be loſt, from whatever cauſe, it is a total loſs.

Thus:—An inſurance was made on the ſhip *Grace*, her cargo and freight, 'At and from *Tortola* to *London*; 'warranted to depart on or before the 1ſt of *Auguſt* 1781. 'The ſhip valued at 2,470l. the cargo at 12,400l. and 'the freight at 2,250l.; at 25 guineas *per cent.* to return

Manning v. *Newnham*, B.R. Tr. 22 *G.* III. MS.

On a voyage from *Tortola* to *London*, the ſhip by ſea damage is obliged to put back on the third day, and cannot be repaired there, and no other ſhip can be got for the cargo:—This is a total loſs of the ſhip, freight, and cargo, and the inſured may abandon.

(*a*) It has been ſaid (*Park*, 170.) that caſes like the preſent can never ariſe again, becauſe it originated in a wager policy, which is prohibited by law.—The policy, in this caſe, can ſcarcely be ſaid to have been a wager-policy: It was rather a valued policy, free from average: But it muſt be recollected that there is in the ſtat. 19 *G.* II. c. 37, a proviſo to exempt privateers from the operation of the firſt clauſe, which prohibits inſurances intereſt or no intereſt; and therefore the policy in this caſe would be a good and valid policy at this day.

'10 *per cent.* if ſhe departed with convoy from the *Weſt* 'Indies, and arrived; *the ſhip, freight, and goods warranted* '*free of particular average.*'—The ſhip and cargo had been a *Dutch* prize, condemned at *Tortola*; but during four or five months that ſhe ſtaid there, was never unloaded. On the 1ſt of *Auguſt* the whole fleet of merchantmen, with their convoy, got under weigh; but not being able to get clear of the iſlands that day, they came to an anchor during the night, and the next day cleared the iſlands. About ten o'clock that day, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the pumps were obliged to be worked; and on the 3d the captain made a ſignal of diſtreſs, and was obliged to return to *Tortola*. On her arrival there, the captain made his proteſt; and a ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo, upon a *London* voyage, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*. There was no evidence of any ſpecial damage to the cargo, which was ſold for a ſum, within 700l. of the value. The owners purchaſed two-thirds of it; the greateſt part of which might have been ſent home and ſold at a great profit. The inſured claimed as for a total loſs on the ſhip, cargo, and freight. At the trial, though the cargo was warranted free from average, yet it ſeemed dangerous ſo permit the inſured to abandon, and thus turn an average into a total loſs. The jury, however, thought the inſured entitled to what he claimed, and found accordingly.—Upon a motion for a new trial, the court, upon full conſideration, were of opinion that the verdict was right and ought to ſtand.—Lord *Mansfield* ſaid,—" At the trial, my prejudices were in favour of the underwriters; but upon better conſideration, I agree with the reſt of the court that the jury did right. *If, by the perils inſured againſt, the voyage be loſt and gone, it is a total loſs, otherwiſe not.* The ſhip received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ſhips could be had, both together not capable of taking the whole of the cargo on board. The voyage was ſo completely loſt, that no ſhip could be got; and the inſured were unable to ſend that part of the goods which

they had purchaſed, forward to *England*; and yet no body bought but to ſend to *England*. If the voyage could have been continued in another ſhip, there might have been freight *pro rata*. But it was admitted that there was a total loſs on the freight, becauſe the ſhip could not perform her voyage; and the inſured were not to wait till ſhips could be had. The ſame argument applies to the ſhip and cargo. This is a contract of indemnity, and the inſurance is that the ſhip ſhall come to *London*. Introducing nice diſtinctions is inconvenient and dangerous. Upon turning this caſe in every view, the court are of opinion that the voyage was totally loſt; and this is the ground of our determination."

It can only be upon a loſs expreſsly within the policy.

But though the voyage be loſt, yet, if this have not been occaſioned by the happening of any of the perils inſured againſt, it will not be a loſs within the policy. As if, in the courſe of the voyage, the captain be informed that the port of deſtination is in the hands of the enemy, or ſhut againſt ſhips of his nation, this will afford no ground for the inſured to abandon (*a*), and though the cargo, being of a periſhable nature, is loſt in conſequence of the diſappointment (*b*).

If a cargo be damaged ſo as to be reduced in value to leſs than the freight, it will be a total loſs.

If a cargo be damaged in the courſe of the voyage, and it appear that what has been ſaved is leſs in value than the amount of the freight; this is clearly a total loſs. This doctrine is warranted not only by the paſſage from *Le Guidon* which has been already cited, but alſo by the opinion of Lord *Mansfield* in the caſe of *Goſs* v. *Withers* (*c*), and by that of Lord *Hardwicke* in the following caſe.

Boyfield v. *Brown*, at N. P. 2 *Str.* 1065.

An action was brought on a policy upon corn for 200 l. but of the value of 217 l., the defendant having ſuffered judgment to go by default, upon the execution of a writ of enquiry, before Lord *Hardwicke*, C. J. it appearing that the corn, being damaged, was ſold for only

(*a*) Per Lord *Ellenborough* at N. P. in *Lubbock* v. *Rowcroft*, ſup. 220.——(*b*) R. *Hadkinſon* v. *Robinſon*, ſup. 218.——(*c*) Vid. ſup. 567.

671.,

671l., and the freight came to 801.—Upon this, the queſtion was, whether, as the freight exceeded the ſalvage, this was not to be conſidered as a total loſs. For the plaintiff it was inſiſted that he ought not to be in a worſe ſituation than if his corn had gone to the bottom; for then he would have had no freight to pay; but now that the voyage has been performed, whereby freight is become due, he has a right to apply the ſalvage to diſchage it. It was proved to be the uſage, that, where the ſalvage exceeds the freight, to deduct the freight out of the ſalvage, and make up the loſs upon the difference.—For the defendant it was inſiſted that, as his inſurance was upon the corn, and the whole did not periſh, he ought, in making up the loſs, to deduct the ſalvage: But no inſtance could be ſhewn, on either ſide, of an adjuſtment where the freight exceeded the ſalvage.—The Chief Juſtice was of opinion that, within the reaſon of deducting the freight, where the ſalvage exceeds it, the plaintiff, in this caſe, where it fell ſhort, was intitled to have it conſidered as a total loſs. The jury found according to this direction (*a*).

In what caſe the inſured may abandon by the law of *France*.

In *France* the diſtinction is this: In caſe of ſhipwreck, the inſured may abandon, though the goods be recovered and carried to their place of deſtination, becauſe goods thus ſaved are generally in a bad and unmarketable condition. But if the ſhip become unnavigable, the inſured cannot abandon the goods, if by any other ſhip they may be conveyed in time to their place of deſtination (*b*).

(*a*) This caſe was before the year 1749, when the common memorandum was introduced into policies, that corn, &c. ſhould be free from average, unleſs general, or the ſhip be ſtranded. Vid. *Maſon* v. *Scurray*, ſup. 226. where, in a ſimilar caſe, Lord *Mansfield* held it to be but a partial loſs, for which, as that caſe was upon a policy with the common memorandum, the inſurer was not liable.——(*b*) *Emerig.* tom. 2. p. 187, 188.

Sect. II.

Within what Time the inſured may abandon.

IF by any of the perils inſured againſt, the ſhip and cargo be loſt for a time, or the voyage be loſt, ſo as to afford no preſent proſpect of ſaving the one, or proſecuting the other with effect, this, while it laſts, amounts to a total loſs, and the inſured may abandon; but he is not, as we have already ſeen (*a*), in any caſe, bound to abandon. He may chuſe whether he will take what can be ſaved, and demand as for a partial loſs, or abandon, and claim as for a total loſs. A loſs may be total in its nature, and ſuch that no ſubſequent event can render it partial; another, which at firſt ſhall be deemed total, may, by ſubſequent events, become partial. If the inſured, while he has a right to conſider the loſs as total, elect to abandon, this will fix the nature of the loſs; and no ſubſequent event can render it partial. It ſeems reaſonable and neceſſary, therefore, that ſome time ſhould be fixed when the degree of reſponſibility of the underwriter ſhould be aſcertained. The inſured muſt not, by treating the accident for a time as a partial loſs, take the chance of making the beſt of it for himſelf; and when he finds that it will not anſwer, attempt, by abandoning, to turn it into a total loſs. In ſeveral maritime ſtates on the continent, poſitive regulations have been eſtabliſhed, limiting the time, after a loſs has happend, within which the inſured may abandon. In *France*, *Spain*, and *Holland*, the times are limited by law, according to the diſtance of the place where the loſs happens, within which the abandonment muſt be made (*b*).

Some time ſhould be fixed when the degree of the inſurer's reſponſibility ſhould be aſcertained.

But the times thus limited muſt often prove either too long or too ſhort, and frequently occaſion great loſs and

In *England*, the inſured, as ſoon as he is informed of a total loſs, muſt elect to abandon or not. If he mean to abandon, he muſt give reaſon-

(*a*) Sup. 564.——(*b*) Vid. Ord. de la mar. h. t. art, 48, 49; 2 *Mag.* 416.

incon-

able notice to the insurers; otherwise he will wave his right to abandon.

inconvenience either to the insured or the insurer. In *England* we have no such positive regulation, nor any time limited by law for abandoning: Our courts have laid down a rule, which seems better suited to the practice of commerce, and more likely to prevent frauds than those we have just alluded to. This rule is, that as soon as the insured receives advice of a total loss, he must make his election whether he will abandon or not: If he determine to abandon, he must give the underwriters notice of this *within a reasonable time* after the intelligence arrives; and any unnecessary delay in giving this notice will amount to a waver of his right to abandon; for unless the owner do some act, signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage (*a*); unless, indeed, it be in effect total. This rule, which has been long established, is analogous to the general principle of the common law, which requires that all notices of acts, affecting the interests of third persons, shall be given *within a reasonable time*. In the following case this doctrine was first explicitly laid down by the court of King's Bench.

Mitchell v. *Edie*, 1 T. R. 608.

A ship being taken, the captor takes out her stores and part of her crew, and sets her at liberty: This obliging her to return into the nearest port, her voyage is lost, and her cargo, which is insured, is sold by an agent who becomes insolvent.—But, after three years, in which the insured adopts the acts of the agent, he shall not be at liberty to abandon, and throw the loss occasioned by the failure of the agent on the underwriters.

Goods were insured, 'from *Jamaica* to *London*.'—The ship was captured by an *American* privateer; and, in a few days afterwards, the captor, having stripped her of her stores and part of her rigging, and having taken out some of her hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3 *per cent.*: And the part of her cargo taken out did not amount to that sum. In consequence of the ship's losing a part of her crew, it became impossible for her to pursue her voyage, and she was obliged to bear away for *Charlestown*, where she was put into the hands of one *Cruden*, a part owner, who sold the cargo, but remitted none of the money home. In his books, he gave the *underwriters* credit for the amount. At the time of the sale he was in bad circum-

(*a*) Per *Buller*, J. 1 T. R. 616.

stances,

ſtances, and afterwards became inſolvent. It appeared, however, that the other owners looked to *Cruden* for two or three years for payment; during all which time, no notice of abandoning was given by the inſured to the underwriters. In an action on the policy, the defendant paid a ſum of money into court, being the amount of the average loſs.—Two queſtions were made at the trial: *Firſt*, whether the plaintiffs were entitled to recover as for a *total loſs*. Upon this, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion that, as there had been a capture, which for a time had occaſioned a total loſs, the owners had an option to abandon, or not, as they pleaſed: But, if they had choſen to abandon, they ought to have done it immediately, upon receiving intelligence of the loſs; and, as they had not done ſo, but had looked to *Cruden*, as their agent, for payment, they had waved their right to abandon, and could only recover as for a *partial loſs*. The ſecond queſtion aroſe out of the particular circumſtances of the caſe, not properly belonging to this branch of the ſubject, and, indeed, of no general importance. The jury found a verdict for the defendant.—Upon a motion for a new trial, the court (*a*) were clearly of opinion that the plaintiff was not entitled to recover.—Mr. Juſtice *Aſhurſt* ſaid;—"The general rule is, that where any part of the property inſured has been ſaved, the inſured cannot recover as for a total loſs, unleſs he make his election to abandon, and give reaſonable notice to the underwriters of his intention. But it is contended that the inſured never wave their right to abandon while they are managing in the beſt manner they can for the benefit of all concerned: And that argument is grounded on the common clauſe inſerted in every policy, whereby the inſured is authoriſed, 'to ſue, 'labour and travail, in and about the defence, ſafeguard, 'and recovery of the goods, &c., without prejudice to 'the inſurance.' Now this clauſe does not warrant the poſition to the extent contended for. The meaning of

He might have abandoned, but he ought to have done ſo immediately on receiving intelligence of the loſs. Not having done ſo, he gives credit to the agent.

The meaning of the clauſe in the policy which enables the inſured to labour for the recovery of the goods without prejudice to the inſurance.

(*a*) Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Buller*.

it

it is, that, till the insured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandoning: And this is reasonable, because the loss may happen at a great distance, so that the insured cannot exercise their judgment immediately: It is therefore necessary that the master, who is on the spot, should do the best he can. But the insured are bound to decide, and signify their election to the underwriters the first opportunity; for though the person who takes upon him to act on the occasion for the benefit of all concerned, is not the agent of the insured, yet if, upon receiving notice of the loss, they do not elect to abandon, they adopt the acts of such person, and make him their agent. This is something like the notice that is to be given to the drawer of a bill of exchange, in case of non-payment, which, if the holder omit to do, he is considered as giving credit to the acceptor, and therefore the loss, if any, must fall on him. There may be cases where the acts of the captain may not make him the agent of either party; and then he only acts in common for them both, till notice is received by the parties at home. If, after such notice, he be continued in the agency, he becomes the agent of the party by whom he is so confirmed: But he cannot be considered as the agent of the underwriters, till notiee has been given to them, and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though, till notice of the loss was first received by the insured, the property continued at the risk of the underwriters. Here, *Cruden* for near three years was considered by the insured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and, till his insolvency, there was no appearance of any intention to disown him: That was the first moment when the insured thought of abandoning.—Mr. Justice *Buller* said; —"It is true that the insured are not *bound* to abandon: On the contrary, all the cases have said that where they are entitled to abandon, they have the option to do so or not; but unless they do elect to abandon, it is only an

The insured is bound to decide and give notice of his decision the first opportunity.

If he neglect this, he adopts the acts of the agent.

If the captain be continued in the management after such notice to the underwriters, he becomes their agent.

average loſs.—The only point to be conſidered is, whether this doctrine will be productive of any uncertainty: If it would, that would be a ſufficient reaſon, in a new caſe, for not adopting it. But, in my opinion, a contrary deciſion would be productive of infinite uncertainty; for it would leave open a very vague queſtion, namely, what time the inſured ſhould be allowed to abandon. If it can extend to three years, there is no reaſon why it ſhould not extend to a much longer period: But no uncertainty can follow from this determination; for our opinion is, that when the account of a loſs has reached the inſured, they muſt make their election whether they will abandon or not: If they do, they muſt give notice of their intention, to the underwriters, within a reaſonable time. If they act otherwiſe, they cannot be permitted, at any ſubſequent period to change a partial into a total loſs."

In the following caſe the above principles were adopted and enforced by Lord *Kenyon*; and, indeed, they have ever ſince been received and acted upon as clear law.

Goods were inſured, 'At and from *London* to *Jamaica*.' —The ſhip was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were alſo taken out of her. In a fortnight after, as the captors were proceeding to *America*, the ſhip, with the remainder of her cargo, was retaken by an *Engliſh* frigate, and ſent into *Antigua*; and both were ſold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds to be paid over to the concerned, deducting one eighth for ſalvage, according to the then late prize act (*a*). The capture and recapture were entered at *Lloyd's* on the 15th of *February* 1795; but it was not known whither the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addreſſed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at

Allwood v. *Henkell*, at N. P. B. R. after Mich. 1795 *Park* 172.

A recaptured ſhip is carried into a diſtant port, and there ſold for the benefit of all concerned; and the inſured give directions to the agent to have the proceeds remitted to them; but afterwards, and four months after they had notice of the loſs, they give notice of abandonment. —This is too late.

(*a*) 33 G. III. c. 66.

Antigua, informing them of the arrival of the ſhip, and of the ſale of the ſhip and cargo, under a decree of the court; and deſiring to have ſome agent appointed to remit the proceeds to *England*. Powers of attorney were ſent out in *April* by the inſured, for this purpoſe, with orders to remit the proceeds to the banking-houſe of *Smith, Payne* and *Smith*, one of whom was agent to the inſured. —It was objected on the part of the defendant, that although the inſured as well as the *inſurers* were informed of the loſs in the beginning of *April*; yet the inſured did not abandon till *Auguſt*, near four months after the power of attorney had been ſent out to *Antigua*. To this it was anſwered that, the property having been abſolutely ſold, and converted into money, before the inſured knew where the ſhip was taken to; the loſs was total in its nature, and therefore there was no occaſion to abandon.—Lord *Kenyon*, who tried the cauſe, inclined to think that an abandonment was neceſſary, and that the caſe was the ſame as if the property had not been ſold, but remained in *ſpecie* at *Antigua*. But he gave no decided opinion on this point. He ſaid the inſured were not bound to abandon in any caſe; and might, in caſe the ſales had been very advantageous, have taken the benefit of them, in the ſame manner as they might have returned the property, if it had remained in ſpecie. But the inſured muſt make his election ſpeedily, whether he will abandon or not, and put the underwriter in a ſituation to do what is neceſſary for the preſervation of the property whether ſold or unſold: "He cannot," ſaid his lordſhip, "lie by, and treat the loſs as an average loſs, and take meaſures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them." —There was a verdict for the plaintiff for a *partial loſs*.

The inſured muſt make his election ſpeedily.

He muſt not firſt treat the loſs as partial, and then abandon.

Anderſon and another v. Rey. *Fx. Aſſur* 7 *Eaſt*, 38

So, where a quantity of wheat was inſured, from *Waterford* to *Liverpool*, '*free from all average unleſs general*, '*or otherwiſe ſpecially agreed.*' The ſhip, on the 28th of *January*, in proceeding down the river, from *Waterford*, ſtruck upon a rock and immediately filled with water;

Wheat is inſured from *Waterford* to *Liverpool*. The ſhip is

and

and to prevent her from ſinking, ſhe was run on ſhore, where ſhe remained four weeks, with her hull under water at high water every tide, and could not be got off till her cargo was taken out. All the wheat was damaged; about two thirds of it were taken out, and kiln-dried at *Waterford*; part of the remainder was ſold to feed hogs, and the reſidue thrown overboard as uſeleſs. The clear proceeds of the quantity ſaved amounted to 95l. 13s. 4d. which were remitted to the inſured at *Liverpool*, who, on the 18th of *February* 1804, twenty-one days after the accident, gave notice of abandonment at *London*.—Upon this caſe there was a verdict for the plaintiff for a total loſs, deducting the ſalvage.—Upon a motion for a new trial, the court expreſſed an opinion that, as there is a conſtant intercourſe between *Waterford* and *Liverpool*, where the inſured reſided, the abandonment was too late (*a*).— But it appearing by affidavit that the inſured received notice of the loſs at *Liverpool* on the 2d of *February*, and that this was communicated to the defendants on the 4th, with an offer to abandon, which they refuſed; and being now called upon to admit this as a fact in the caſe, they refuſed, upon which a new trial was granted.

ſtranded near *Waterford*. The inſured reſide at *Liverpool*, and the underwriters at *London*. Notice of abanonment three weeks after the accident is too late.

So, if a ſhip be inſured for part of her value, and being captured, the inſured demand as for a total loſs, which the underwriters are willing to pay, on having an aſſignment of *one fourth* part of the ſhip from the owner, by way of abandonment; but the inſured refuſe this, becauſe the one fourth of the ſhip is of greater value than the ſum inſured; and the inſured, inſtead of abandoning, repurchaſed the ſhip from the enemy:—In this caſe, he is not entitled to recover as for a total loſs, not having abandoned; nor can he recover the ſum paid for the repurchaſe of the ſhip, that being an illegal contract, and not only a trading with the enemy,

If the underwriters demand an abandonment of more than they have inſured, this need not prevent the inſured from abandoning to the amount of the ſum inſured: But if he neglect this, he ſhall not afterwards recover as for a total loſs.

(*a*) Lord *Ellenborough* ſaid he rather conceived that it was the province of the judge to direct the jury, as to what is a reaſonable time, under the circumſtances.

but alſo a ranſom, within the meaning of the ranſom act.

Havelock v. *Rockwood*, 8 T. R. 268.

A *Britiſh* ſhip is captured, and carried into a neutral port, and there condemned by the enemy's conſul: If the inſured do not abandon, but repurchaſe the ſhip ſold under the ſentence, he ſhall not recover as for a total loſs: the property never having been out of him by the condemnation; nor ſhall he recover the ſum paid for the repurchaſe, that being a ranſom, and illegal.

Thus:—The ſhip *Themis* was inſured for twelve months, and ſailed on the 4th of *April* 1797, on a voyage from *Shields* to *Riga*; was captured on the 7th of *April* by a *French* privateer, and carried into *Bergen* in *Norway*, where, on the 17th of *April*, ſhe was condemned by a ſentence of the *French Conſul* there.—News of this being brought to *England*, by the captain, the plaintiff demanded a total loſs from the underwriters, on which he received a letter from their broker, informing him that they were ready to ſettle with him, he firſt making an aſſignment of *one fourth* part of the ſhip to the broker for their benefit; and that if the plaintiff had any thoughts of repurchaſing the ſhip, the underwriters would have no objection to pay their *quota* of the price.—The ſum inſured not amounting to one fourth of the value of the ſhip (*a*), the plaintiff declined making the aſſignment.—There were frequent inſtances of this ſort of condemnation in the port of *Bergen* during this war, which were made with the knowledge of the *Daniſh* government, who received duties thereon, and on the ſales in conſequence of them. On the 13th of *July* 1798, the ſhip was ſold by public auction, by the officer appointed by the court of *Denmark* for ſuch ſales, and was puchaſed for the plaintiff, by his agent at *Bergen*, for the ſum of 1628 l. 8 s. 4 d., which was her fair value. The ſhip being then repaired, inſtead of proceeding to *Riga* ſailed to *Peterſburgh* and afterwards returned to *England*.—In an action upon this policy, the defendant paid 30 l. 11 s. 3 d. *per cent.* into court, and upon the trial there was a verdict for the plaintiff as for a *total loſs*, ſubject to the opinion of the court on a caſe which ſtated the above facts.—The queſtions for the opinion of the court were, 1ſt, Whether the plaintiff was entitled to recover as for a total loſs, or only

(*a*) It does not appear, by the report of this caſe, whether the inſurance was upon *one fourth* of the ſhip, or that the ſum inſured amounted to what the underwriters deemed a fourth.

for

for a partial loſs. 2dly, If for a partial loſs only, then, whether the ſum paid for the purchaſe was to be included, in which caſe a nonſuit was to be entered.—It was contended on the part of the plaintiff, that he was entitled to recover as for a total loſs, on the ground that the ſhip was captured by an enemy, and condemned by a court of competent juriſdiction: But the court expreſſing a decided opinion that no *French* court of admiralty could legally be holden in *Denmark*, adopting the deciſion in our court of admiralty, in the caſe of the ſhip *Flad Oyen* (*a*), that point was abandoned as untenable.—It was then inſiſted, 1ſt, That when the ſhip was captured, the plaintiff had a right to abandon, and did in fact abandon; and 2dly, That at leaſt the plaintiff was entitled to recover as for a partial loſs, in which was to be included the ſum paid for the repurchaſe of the ſhip.—On the part of the defendant it was anſwered, 1ſt, That whatever right the inſured might have had to abandon at one time, he ought to have made his election to do ſo, immediately after the capture; but he refuſed to transfer his right to the inſurer, and therefore he could not ſay that he was ready to abandon; and, 2dly, That if this was only a partial loſs, the price paid for the repurchaſe of the ſhip ought not to be included in it, that being a void contract, not only by the ranſom act (*b*), but alſo by the common law, on the ground of its being a trading with the enemy.—The court determined that the plaintiff was not entitled to recover on either of theſe grounds.—They declined giving any opinion on the queſtion, whether the contract at *Bergen* was void, on the ground of its being a *trading with the enemy*, as that queſtion would ſhortly come before the court upon a writ of error, in the caſe of *Potts* v. *Bell* (*c*). The only queſtion then re-

(*a*) Vid. ſup. 389.—(*b*) Vid. ſup. 585.—(*c*) In that caſe it has ſince been determined, upon great conſideration, that any trading by a *Britiſh* ſubject with the enemy, without the King's licence, is illegal, and that a policy on goods bought from the enemy is void. Vid. ſup. 87.

When the purchase of a captured ship shall be deemed a ranſom.

maining was that relative to the ranſom. Upon this they were clearly of opinion, that the tranſaction above ſtated amounted to a ranſom; that the money paid by the plaintiff to regain the poſſeſſion of his ſhip was illegally paid; and conſequently that it could not conſtitute a charge on the underwriter.

But if the inſurers prevent the abandonment, they ſhall pay the whole loſs.

But if, by any interference of the underwriters, the inſured be actually prevented from abandoning, the underwriters are liable for all the loſs ſuſtained by the inſured to the extent of the ſum inſured.

Da Coſta v. Newnham, 2 T. R. 407.

A total loſs having happened, the inſured propoſes to abandon, but is diſſuaded from it by the underwriters, who order the ſhip to be repaired, but afterwards refuſe to pay for the repairs, and the ſhip is, on this account, obliged to be ſold — The inſurers are liable for all the loſs ſuſtained, to the amount of the ſum inſured.

As, where a ſhip was inſured 'from *Leghorn* to *London*, with liberty to touch at *Nice*.'—The ſhip met with an accident in the courſe of her voyage, and was obliged to put into *Nice* to repair. Advice of this was tranſmitted to the owner, who was informed that it would be neceſſary to unload, by which a conſiderable expence muſt be incurred. This he communicated to the underwiters, and expreſſed a deſire to abandon. Some altercation aroſe; they inſiſted on the veſſel's being repaired, and telling him to pay the bills. He at laſt conſented to this; but refuſed to advance any money; in conſequence of which it became neceſſary to take up a large ſum on bottomry. The ſhip was refitted and reſumed her voyage, and gained freight afterwards. Upon her arrival at *London*, application was made to the underwriters, to take up the bottomry bond, which they refuſed, and the veſſel was obliged to be ſold, to ſatisfy that debt, ſo that ſhe never was in the poſſeſſion of the inſured again. The ſum due upon the bottomry bond was 678 l., and the ſhip ſold for 630 l.—Under theſe circumſtances, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion, and it was ſo agreed at the trial and not afterwards diſputed, that there had not been a total loſs at *Nice*; for though the plaintiff offered, and was entitled, to abandon, yet, in truth, he had not abandoned. This, therefore, was conſidered only as a partial loſs.—But Mr. Juſtice *Buller*, at the trial, and the court afterwards, determined, that the underwriters were anſwerable for all the injury that had accrued to the owner in conſequence of their interference, and directions, and their ſubſequent refuſal to diſcharge the

the bottomry bond; that in conſequence of this, the ſhip never came free to the owner's hands, but was obliged to be ſold, and therefore the underwriters were liable to the amount of the inſurance.

In a former chapter it was ſhewn that if no intelligence be received of a ſhip within a reaſonable time, it ſhall be preſumed that ſhe foundered at ſea (*a*). When the time has elapſed which affords that preſumption, the inſured may abandon and claim as for a total loſs

If the ſhip be not heard of in a reaſonable time, the inſured may abandon.

Sect. III.

Of the Form of the Abandonment.

IN the preceding ſection we have ſeen that, as ſoon as the inſured is informed of a total loſs, he muſt make his election whether he will abandon or not. If he determine to abandon, and demand as for a total loſs, he is not obliged, as in ſome foreign countries, to make a formal proteſt (*b*), but merely to give notice of the loſs to the underwriters, and of his determination to abandon.

Notice of abandonment.

It is ſingular that an abandonment is not made in any particular form, or accompanied by any of thoſe ſolemnities which ſuch an act would ſeem to require. In caſes of importance, however, it is not unuſual for the inſured, upon payment of the loſs, to make a formal aſſignment by deed to the underwriters, or to truſtees for the uſe of all who may be concerned in the ſalvage. But, in whatever form an abandonment is declared, it muſt be explicit, and is not to be taken as matter of inference from an equivocal act.

There is no particular form of an abandonment.

Therefore, where a letter to the inſured, ſtating that the ſhip had been forced on ſhore, and a quantity of

Thelluſon v. *Fletcher*, 1 Esp Rep 73, ſup. 129.

(*a*) Vid. ſup. ch. 12, § 1. p. 488. *Emerig.* tom. 2, p. 181.—(*b*) Vid. *Pothier*, h. t. n. 126. *Emerig.* tom. 2, p. 190.

The inſured informs the underwriters that the ſhip has occaſioned, or the goods ſuffered

and the underwriters desire the insured to do the best they can with the goods; this will not turn a partial into a total loss.

sugars damaged, was shown by the broker to the underwriters; and they, by way of answer, desired, 'that the 'insured would do the best they could with the injured 'property;'—It was insisted that this letter amounted to an abandonment, and that the answer of the underwriters was an assent to it.—But Lord *Kenyon*, who tried the cause, said, that as this was but a partial loss, the insured could not, by their own act, turn it into a total one. That it was the interest of the underwriters, and the duty of the insured, to make a partial loss as light as possible; and that this was the meaning and import of the letter, and of the answer of the underwriters.

There must be some notice of it.

This notice of abandonment may be given, either to the underwriter himself, or to the agent who has subscribed for him. And this is necessary though the ship and cargo were sold and converted into money before the notice of the loss was received (*a*).

If the insurance be entire, the insured cannot abandon for part only.

In general, the abandonment ought to be made for the whole of the effects insured, and not for a particular part; as if part be rotten, the insured cannot abandon that part only and retain the rest, but he must abandon the whole or nothing; for the contract being entire, cannot be severed (*b*).—Thus, if I have divers sorts of goods on board a ship; as sugars, indigo, and cotton; and I insure 1000 l. on the hole, without any distinction; this insurance is entire, and I cannot abandon my sugars, and retain my indigo and cotton (*c*).

But if different articles be separately insured or separately valued any one may be abandoned.

But if I insure these articles by different policies; or if, in the same policy, they be separately valued, I may abandon any one article, and retain the rest; because these are, in effect, distinct insurances, though in the same policy (*d*).—So, if I insure a ship and cargo, distinguishing how much for the one, and how much for the other; and the ship in the course of the voyage be condemned,

(*a*) *Hodgson* v. *Blackiston*, at N. P. after Hil. 38 G. III. *Park* 172.— (*b*) Vid. *Valin* on art. 47, h. t. p. 102.— (*c*) *Valin* ubi sup. *Pothier*, h. t. n. 131.— (*d*) *Valin*, ut sup. *Pothier*, n. 132.

as

as incapable of proceeding further; I may abandon for the ſhip, and not for the cargo (*a*). But if I inſure the ſhip and cargo *for one entire ſum*, and the ſhip be ſtranded, I cannot retain the goods, and abandon the ſhip (*b*).

The abandonment muſt be ſimple and unconditional; otherwiſe it will not transfer the entire property to the inſurers, which muſt at all events be done, for this is of the eſſence of the abandonment. If therefore I abandon a captured ſhip, on condition that, in caſe ſhe be releaſed, ſhe ſhall continue my property, and I ſhall repay with intereſt the ſum which the inſurers ſhall have paid me,—ſuch an abandoment would be void (*c*).

It muſt be unconditional.

Sect. IV.

Of the Effect of an Abandonment.

BY the abandonment, the inſured, as we have already obſerved, yields up to the inſurers, all his right, title, and intereſt in the ſhip or goods inſured, or what may be ſaved of them, which, from the notice of abandonment, become the property of the inſurers (*d*). It operates as a transfer to them, in proportion to their reſpective ſubſcriptions, without any regard to the priority of the policies, if more than one (*e*); and though the ſhip or goods ſhould appear, by the ſeveral policies, to be over-inſured (*f*). And this transfer has a ſort of retroſpective relation in reference to the inſurers, who, to the extent of the ſum inſured, are preſumed to have been, from the beginning, owners of the things inſured (*g*), according to the rule of the *Roman* law, *Quod repudiatur, retro noſtrum non fuiſſe palam eſt* (*h*).

The abandonment transfers the property ſaved to the inſurers in proportion to their reſpective ſubſcriptions.

And it relates back to the commencement of the voyage.

(*a*) *Emerig.* tom. 2, p. 215.——(*b*) *Emerig.* tom. 2, p. 215.——(*c*) *Valin*, art. 60, p. 133, art. 47, p. 103. *Emerig* tom. 2, p. 194.——(*d*) Vid. *Lex Rhodia*. ch 7. art. 1.——(*e*) *Emerig* tom. 2 p. 194.——(*f*) Vid. ſup. ch. 4, § 4. p. 146.——(*g*) *Emerig.* tom. 2, p. 196.——(*h*) *Ff.* lib. 38, tit. 5. *Si quid in fraudem.*

This

In *France* the abandonment of the ship transfers the freight she has earned.

This principle is carried so far by the *French* law, that, by the abandonment of a ship, the insurer becomes intitled to all the freight she may have earned, freight being deemed an incident inseparable from the ship. *Emerigon* even goes the length of saying, that it is inconsistent with the nature of the contract of insurance, that the owner should claim the freight of a ship, the value of which he has received from the insurer upon the abandonment. And he supports this opinion on the ground that in the course of the voyage the value of the ship must necessarily diminish in nearly the same proportion as the freight increases; and consequently, that the value of the ship and freight, at any given time in the voyage, is only equal to the original value of the ship, at the commencement of the voyage (*a*). But this notion could only have originated in the absurd supposition that a ship can earn no more freight, in any voyage, than is sufficient to reinstate her in the same condition she was in when she sailed on that voyage.

By the abandonment of the ship the insurer becomes the legal owner, is liable for all her outgoings, and entitled to all her future earnings.

By the abandonment of a ship, according to our law, as I understand it, the insurer becomes the legal assignee and owner, and from that time, he is liable for all her future outgoings, and consequently entitled to all her future earnings. While any profit can be derived to the insured from the future use of the ship, it cannot be deemed a total loss; and he can only exercise the right of abandoning, upon the presumption in law that the existing circumstances are equivalent to a total loss. Under such circumstances, the owner compels the insurer to purchase the hope of salvage, for the full value insured, and thereby puts him into his place for all chances favourable or otherwise. The chance of the ship's earning freight is one ground of the calculation made by the insured, when he decides whether or not he will abandon. The insured could not receive more, if the ship had been actually lost or destroyed, than he receives upon an abandonment; and, in such a case, he cannot be in a better situation than if such a loss had really happened: Nor is it reasonable that the insurer, who, besides paying the full

(*a*) Vid. Emerig. tom. 2, p. 221, vid. sup. ch. 3, § 6.

value

value of the ſhip, incurs the expence and riſk of all future contingencies, ſhould not be entitled to her future earnings.—After an abandonment of a ſhip, the underwriters are not bound to purſue the voyage contracted for, at their own riſk and expence, without any compenſation; for a contract of this nature is not like a mortgage which binds the land; but is perſonal, and only binds the owner who made it. And even ſuppoſing the previous contracts of the owners with the freighter would, in equity, after an abandonment, bind the underwriters to purſue the voyage, if practicable, the ſame equity would transfer to the latter the benefit, as well as the burthen, of thoſe contracts. Some voyages, ſuch as thoſe to the *Eaſt Indies*, may laſt two or three years. The ſhip may be ſtranded at the commencement of her outward voyage, and be in ſuch peril as to warrant an abandonment. If then, the owner, electing to abandon, receive payment from the underwriters on the ſhip, as for a total loſs, it cannot be contended that he would be entitled to the uſe of the ſhip for the remainder of the voyage.

The underwriters upon the ſhip are not bound to take notice of any contract for freight, or the inſurance of it, to which they are no parties. They are not obliged to accept a qualified abandonment; and an unqualified abandonment muſt transfer to them the entire property, with all its incidents. There cannot, therefore, be an abandonment of the ſhip and freight to different ſets of underwriters. It is with good reaſon, therefore, that the laws of *France* and other countries conſider freight as ſo inſeparable in its nature, from the property of the ſhip, that they do not permit them to be ſeparately inſured (*a*); and the difficulties which aroſe in the following caſes ſufficiently ſhew the inconſiſtency, not to ſay the abſurdity, of the contrary practice, as permitted in this country.

The underwriters are not bound by the contracts of the inſured reſpecting freight, or the inſurance of it.

If both ſhip and freight be inſured in the ſame policy, it can never be a queſtion to whom freight, earned after

If the ſhip and freight be ſeparately inſured, and each be abandoned; to whom freight ſubſequently earned ſhall belong.

(*a*) Vid. ſup. ch. 3. § 6.

an

an abandonment, and payment of a total loſs, ſhall belong; But where the ſhip and freight are ſeparately inſured, and each is abandoned to the reſpective underwriters, it then becomes a queſtion to which ſet of underwriters freight earned afterwards ſhall belong.—In the following caſe that queſtion was much conſidered; but the court determined it upon the expreſs contract of the inſured, upon the abandonment, to aſſign all freight that might be recovered to the underwriters on freight. But it is not to be inferred from this, that it was the opinion of the court that the underwriters on the ſhip were not entitled to the freight: On the contrary, the court ſeems to have thought that the inſured was bound to account to them alſo for the freight earned by the ſhip, deducting the expences of proviſions, wages, &c.

Thompſon v. *Reweroft*, 4 *Eaſt*, 34.

A ſhip and freight are ſeparately inſured, and the ſhip being laid under embargo in a foreign port, the owner abandons the ſhip and the freight to the reſpective underwriters, who pay a total loſs on each; the owner undertaking, in caſe the ſhip ſhould be reſtored, to aſſign the ſhip to the one ſet of underwriters, and the freight to the other. The ſhip is reſtored, and earns freight, which is paid to the owner.—Whatever may be the right of the underwriters on the ſhip to the freight thus earned, the inſured is bound by his expreſs contract to pay the freight ſo received to the underwriters on

In that caſe the defendant, having chartered the ſhip *Theſeus* to one *Saunders* for a voyage to *Riga*, to fetch a cargo of timber to *Portſmouth*, cauſed a policy to be effected on the *ſhip* from *Portſmouth* to *Riga* and back, for 2,400l and another upon the *freight* from *Riga* to *Portſmouth* for 1,400l.—After the ſhip arrived at *Riga*, an embargo was laid by the *Ruſſian* government on all *Britiſh* ſhips in that port; the captain and crew were marched up the country, and detained as priſoners from *November* 1800 till *May* 1801. Upon intelligence of theſe events arriving in *England*, the defendant abandoned, and received from the reſpective ſets of underwriters the amount of their reſpective ſubſcriptions as for a total loſs, and ſubſcribed an indorſement on the policy on the *ſhip*, dated 19th *January* 1801, undertaking 'to account to the 'underwriters for the ſhip, if reſtored to or recovered 'by them; or to make an aſſignment to them in proportion to the ſums inſured.' He alſo ſubſcribed an indorſement on the policy on *freight*, dated the 11th of *February* 1801, ſtating, 'that the intereſt in the freight 'inſured, being abandoned to the underwriters to the 'extent of their ſubſcriptions, it was agreed to aſſign all 'right of recovery, compenſation, &c. &c. to certain 'perſons named, for the benefit of the underwriters and 'the inſured, according to their reſpective intereſts.'—The embargo being afterwards taken off, the ſhip was reſtored,

ſtored, and brought a cargo to *Portſmouth*, and the defendant received 1,857l. for freight.—The plaintiff, who was an underwriter on the policy on *freight* for 150l. called on the defendant to make an aſſignment of the freight, according to the indorſement on the policy on freight, or to pay him the 150l. and intereſt.—The underwriters on the ſhip inſiſted that they were entitled to the freight, and gave the defendant notice of this claim. —The argument of this caſe at firſt proceeded on the idea that the defendant was a mere ſtakeholder, and that the queſtion aroſe between the underwriters on the ſhip and thoſe on the freight, viz. which of them were entitled to the freight earned after the abandonment. But the queſtion was narrowed by the court to the conſideration of the ſpecific agreement between the plaintiff and defendant; and upon this ground alone the caſe was decided in favour of the plaintiff.—Lord *Ellenborough* ſeemed to be of opinion that if the queſtion had been, which of the two ſets of the underwriters were entitled to the freight earned by the ſhip after the abandonment, thoſe on the ſhip ought to have prevailed.—But the court were clearly of opinion that, in this caſe, the owner was bound by the terms of his contract, to pay the underwriters on the freight their proportion of the freight which he had received.—It was then ſuggeſted on behalf of the defendant that at leaſt he was entitled to deduct the expences of the voyage, ſuch as wages, proviſions, &c. which were in the nature of ſalvage on the freight.—But Lord *Ellenborough* ſaid,—"The defendant has received the entire freight, and therefore he muſt pay it over. The underwriters on the ſhip, from the time of the abandonment to them, ſtand in the ſame ſituation as the owner; and as the owner was liable to all theſe expences before, ſo, after the abandonment, they muſt be borne by the underwriters on the ſhip. Expences of this ſort are not, properly ſpeaking, ſalvage on the freight, but they are charges paid by the owner of the ſhip for the benefit of thoſe to whom he abandoned it; and therefore he will be entitled to retain a proportionable part on his ſettlement with them."[a]

freight. And he has no right to deduct the wages or other charges out of it.

Latham & Terry, 3 *Bos. & Pul.* 479.

Same point decided.

In a ſubſequent caſe, circumſtanced nearly the ſame as the above, the inſured abandoned firſt to the underwriters on the ſhip, afterwards to thoſe on freight, and undertook, upon payment of the loſs, to aſſign to the underwriters on the *ſhip*, 'all their right and intereſt in 'the ſhip, in ſuch manner as the committee for adjuſting 'the loſs might direct;' and to the underwriters on *freight*, 'all their right and title to all future benefit 'that might accrue thereafter, except as inſurers therein.' —The court, conceiving that in this, as in the laſt caſe, the inſured having bound themſelves to account to the underwriters on freight, for all the freight they might receive, determined that they had made themſelves reſponſible to the underwriters on freight for the freight they had received; they intimated, however, that the underwriters were to contribute proportionably to the expence of bringing the cargo home.—But, in giving judgment, they expreſsly declared that they did not mean to decide the queſtion, as between the two ſets of underwriters.

M'Carthy and others v. *Abel*, 5 *Eaſt*, 388.

Upon an hoſtile embargo, the inſured abandons the ſhip and freight to the reſpective underwriters on each. The ſhip performs the voyage and earns freight, which is paid to the underwriters on the ſhip But, the ſhip having *earned freight*, the inſured cannot recover againſt the underwriters on freight.

A third caſe, under circumſtances nearly ſimilar, has ſince been determined. It was an action brought by the owners of the ſhip *Thomas* againſt the underwriters in a policy on freight from *Riga* to *Plymouth*. There, the plaintiffs, upon receiving intelligence of the embargo, abandoned *their intereſt in the freight* to the underwriters thereon; and, at the ſame time, abandoned *the ſhip* to the underwriters on the ſhip, and aſſigned the ſhip to truſtees for the uſe of the underwrirers thereon, they agreeing to pay a total loſs. The maſter of the ſhip afterwards drew a bill on the agent of the underwriters on the ſhip for 718l. 3s. 6d. to pay for repairs at *Riga*; and, on his arrival at *Plymouth*, received from the agent of the freighters 500l. part of the freight, to pay ſeamen's wages and the charges of landing the cargo. The freight earned by the ſhip amounted to 2,242l. 6s. 10d. the balance of which, after deducting the 500l. was paid to the agent of the underwriters on the ſhip, under an indemnity againſt any claims which might be made, either by the owners of the ſhip, or the underwriters on freight.—On behalf of the plaintiffs it was argued, that the law of *England*,

England, in recognizing ſhip and freight as diſtinct ſubjects of inſurance, neceſſarily recognizes them as diſtinct ſubjects of abandonment; and therefore, as a ſimple inſurance of a ſhip does not cover freight, ſo an abandonment of the former muſt be always underſtood with an implied reſervation of the latter. That the freight which has been earned and paid cannot, as between theſe parties, deſtroy the right of action which accrued to the inſured upon the abandonment; but that, at moſt, it was only ſo much ſalvage for the benefit of the underwriters on freight, which they were entitled to recover from the freighters. —But the court determined in favour of the defendant.—Lord *Ellenborough*, in delivering the judgment of the court, did not expreſs any opinion upon the queſtion, whether a title to the freight paſſed by the aſſignment of the ſhip, but merely ſaid that the ſhip having earned freight, no loſs could properly be demandable againſt the underwriters on freight; and that, if the freight could, in any other ſenſe, be conſidered as loſt to the inſured, it became ſo, not by any of the perils inſured againſt, but by an abandonment of the ſhip, which was the act of the inſured themſelves, with which the underwriters on freight had no concern.

In a ſtill more recent caſe, where the facts were nearly ſimilar, the inſured abandoned, firſt, the ſhip, and afterwards the freight, to the reſpective underwriters on each, who accordingly paid a total loſs on each. The ſhip, which was a *ſeeking*, and not a chartered, ſhip, earned 1,900l. freight on her homeward voyage, which was paid to the inſured. In an action brought by one of the underwriters on *freight*, for his proportion of this ſum, as money received by the inſured to his uſe, it ſeems to have been aſſumed, that the underwriters on freight were entitled to the benefit of ſalvage, and therefore entitled to the freight received by the inſured, deducting the expences to which freight is liable; and the principal queſtion was, what thoſe expences ought to be.—The court determined that the following expences incurred in proſecuting the adventure might be deducted from the ſalvage on the ſhip and freight, in proportion to their

Sharp v. *Gladſtone*, 7 *Eaſt*, 24.

In a ſimilar caſe, the freight received by the owner is payable to the underwriters on freight, ſubject to a deduction of a proportion of the charges incurred in proſecuting the voyage.

reſpective values. 1. The expence of the ſhip and crew in the foreign port, including port charges, beſide the expence of ſhipping the cargo, which excluſively falls on the underwriters on freight; 2. Inſurance thereon; 3. Wages of the crew during their detention; 4. The wages and proviſions of the crew, from their liberation in the foreign port till their diſcharge at home: But, that the inſured was not entitled to deduct, 1. The charges paid at the port of diſcharge on the ſhip and cargo; 2. Inſurance on the ſhip; 3. Diminution of the value of the ſhip and tackle, by wear and tear, on the voyage home.—Lord *Ellenborough*, in the courſe of the argument, took an opportunity of obſerving that, after an abandonment of the ſhip to the underwriters on the ſhip, he had great difficulty in ſaying that the inſured could abandon the freight, which ſeemed to follow the property in the ſhip, being the earnings made by the ſubſequent uſe of that which was then become the property of others, to another ſet of underwriters; and, as a general queſtion, he deſired to be underſtood as giving no opinion upon it.

Where the inſurance is for leſs than the value of the thing inſured, the abandonment is in the ſame proportion.

Where the intereſt of the inſured is not entirely covered by the inſurance, he may abandon to the extent of the ſum inſured; for he is his own inſurer for the reſidue.—Thus, if goods of the value of 5,000l. be inſured only to the amount of 4,000l. and a total loſs happen, the inſured ſhall only abandon four fifths of what is ſaved; the remaining fifth will belong to himſelf (*a*); and he will be tenant in common, for that fifth, with the inſurers.—The ſame rule holds where the cargo, by a new purchaſe during the voyage, is augmented in quantity.

If goods be partly inſured, and money borrowed on reſpondentia for the reſidue; the inſurer, will have the legal title to what is abandoned, and the lender an *equitable claim* for his proportion.

So, where goods are only partly inſured, and the owner has borrowed money on reſpondentia to the value of the reſidue; if he abandon, the inſurer and the lender have a joint claim to what is ſaved, in proportion to their reſpective intereſts. But by the abandonment, the inſurer is put in the place of the inſured, and has the *legal title*

(*a*) *Emerig*, tom. 2, p. 215, 237. *Valin.* ſur. art. 47, h. t. p. 106.

to

to the effects saved, and the lender only an *equitable claim* to his proportion (*a*).

In *France* the claim of the lender is preferred to that of the insurer.

Yet, by the law of *France* (*b*), the claim of the lender, in such case, shall be preferred to that of the insurer, to the extent of his capital.—The reason of this preference is, that the lender contributes directly to the procuring of the goods; whereas the insurer is only a surety to protect the adventurer from the risk, without furnishing the thing put in risk. The lender has a substantial interest in the goods, and being in nature of a pawnee, has a sort of *lien* on them, which cannot be discharged by the transfer which the abandonment operates to the insurer. This only puts the insurer in the place of the insured; but the creditor and debtor can never have concurrent rights (*c*). *Emerigon* even goes so far as to say that the lender's claim ought to be preferred, even for the marine interest.—*Valin* (*d*) holds a contrary opinion, and argues to refute this reasoning contained in a letter which he had received from *Emerigon* on this subject. *Emerigon*, however, in his book, supports his former opinion, and triumphs in its being sanctioned by the approbation of *Pothier* (*e*).

If there be three policies, one on the ship and cargo, one on the ship only, and one on the cargo only; how, in case of abandonment, the claims of the different sets of insurers shall be adjusted.

If there be three insurances; one on the *ship and cargo*; one on the *ship* only; and one on the *cargo* only; *Emerigon* (*f*) thinks that insurers on the ship and cargo have an equal claim on the effects saved, with the insurers on the cargo only, and that they have a like claim on the freight, and the remains of the ship, with the insurers on the *ship only*, in proportion to their respective subscriptions.—For example: If a ship be valued at 5,000l., the cargo 5,000l., total 10,000l.; and these are insured by different policies, thus;

(*a*) Vid. *Emerig.* t. 2. p. 234.——(*b*) Ord. mar. tit. *contrats à la grosse*, art. 18.——(*c*) *Emerig.* tom. 2, p 234, 235.——(*d*) *Valin*, tit. *contrats à la grosse*, art. 18.——(*e*) *Pothier*, *contrats à la grosse*, n. 49.——(*f*) Tom. 2, p. 240.

	£
On ſhip and cargo - - -	3,000
On the ſhip only - - -	3,000
On the cargo only - - -	3,000
Uninſured - - - -	1,000
	10,000

A ſhipwreck happens, and the net proceeds of the wreck of the ſhip are 500l., and of the cargo 500l.; total 1,000l. *Emerigon* would adjuſt the claims of all parties thus:

	£
To the owners for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of the produce of the wreck, - -	225
The like to the inſurers on the ſhip, - -	225
To the inſurers on the cargo, a moiety of the produce of the goods ſaved, - -	225
The like to the inſurers on the ſhip and cargo,	225
	1,000

By this adjuſtment the inſurers on the ſhip and cargo would have a double ſhare of the effects abandoned, which is manifeſtly unjuſt.—An *Engliſh* merchant would, I conceive, adjuſt the different claims thus:

	£
To the owners, for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of three-fifths of the produce of the wreck, -	150
To the inſurers on the ſhip, three-fifths of the produce of the wreck, - - -	300
To the inſurers on the cargo, three-fifths of the produce of the goods ſaved, - -	300
To the inſurers on the ſhip and cargo, a moiety of three-fifths of the produce of the goods ſaved, - - - -	150
	1,000

The

The abandonment does not only entitle the underwriters to all that can be ſaved of the effects inſured; but if compenſation be made to the inſured for the injury from which the loſs aroſe, this compenſation ſhall go to the underwriters; for when they have paid the loſs, they, and not the inſured, are the real ſufferers.—This will appear by the following caſe:

If, after the loſs is paid, compenſation be made to the owner, this ſhall go to the inſurer.

The King granted letters of repriſal againſt the *Spaniards*, for the benefit of his ſubjects, in conſideration of the loſſes they had ſuſtained by unjuſt captures. The commiſſioners appointed to diſtribute the produce of theſe repriſals among the ſufferers, would not permit the *inſurers*, but the *owners only*, to make claim to the parts of the prizes allotted to the ſufferers, although the owners were already ſatisfied for their loſs by the inſurers, who thereupon brought their bill in *Chancery*.—Lord *Hardwicke*, C. decreed in favour of the inſurers.—He ſaid;—"The perſon originally ſuſtaining the loſs was the owner; but, after ſatisfaction made to him, the *inſurer*. No doubt but, from that time, as to the goods themſelves, if reſtored *in ſpecie*, or compenſation made for them, the inſured ſtood as a truſtee for the inſurer, in proportion to what he paid; although the commiſſioners did right to avoid being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſaw who was owner; nor was it material to them to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made."

Randal v. *Cockran*, in Chan. 1748. 1 *Ves.* 98.

Repriſals being made on the *Spaniards* to indemnify the ſufferers by unjuſt captures; the inſurers, who have paid the owners the loſſes ſuſtained by thoſe captures, ſhall ſtand in their place, and receive their proportion.

If, upon a total loſs happening, the ſhip be abandoned, but ſhe afterwards arrive ſafe; this ſhall not avoid the abondonment. On the one hand, the inſurers ſhall take to their own uſe all the profit of the voyage; and the inſured is entitled to nothing, except for ſo much as he was uninſured (*a*). On the other, they ſhall not, on account of the ſafe arrival of the ſhip, refuſe to

If the ſhip, after abandonment, arrive ſafe, the inſurer ſhall have all the profit of the voyage.

(*a*) *Le Guidon*, ch. 7, art. 12.

pay the ſum inſured.—As if, upon a capture, the inſured abandon, and the ſhip be afterwards releaſed, or otherwiſe recover her liberty; the inſurers ſhall nevertheleſs ſatisfy the inſured as for a total loſs: But then they are entitled to all the benefit of the voyage (*a*).

But they cannot compel the inſured to take back the thing inſured, and refund the money.

So, if the ſhip or goods inſured happen to be recovered undamaged, after the inſurer has paid a total loſs; the following caſe will ſhew that he cannot compel the inſured to refund the money, and take back the ſhip or goods; but the inſurer ſhall ſtand in his place, and ſhall have the benefit of ſalvage.

Da Coſta v. *Frith*, 4 *Bur.* 1966, ſup. 132.

An inſurance was made, 'Upon any of the packet-'boats that ſhould ſail from *Liſbon* to *Falmouth*, for 'one year, upon any kind of goods; ſuch goods to be 'valued at the ſum inſured on the packet-boat, with-'out further proof of intereſt than the policy; and to 'make no return of premium for want of intereſt, be-'ing on bullion or goods.'—The defendant, who was one of the inſured, had an intereſt in bullion on board the *Hanover* packet, on a voyage from *Liſbon* to *Falmouth*. The ſhip was totally loſt off *Falmouth*; and the loſs was adjuſted at 100l. *per cent.*; but by a memorandum on the policy, the inſured agreed that,—'*Should any* '*ſalvage* thereafter be recovered, he would refund to 'the inſurers, *whatever he might ſo recover*, in ſuch propor-'tion as the ſum inſured bore to the whole intereſt'; and the inſurer accordingly paid the whole ſum inſured. —An iron trunk, which contained all the bullion, was afterwards fiſhed up, and the bullion recovered, without any loſs or prejudice whatever, and delivered to the inſurer. The expence of ſalvage amounted to 63l. 8d. 2d. —The inſurer, upon this, brought an action againſt the inſured for money had and received, to recover back the amount of his ſubſcription. The defendant (the inſured) paid into court 48l. 4s., being the plaintiff's proportion of the value of the bullion recovered, after deducting the expence of ſalvage.—On the part of the plaintiff (the

A total loſs is paid on a quantity of bullion, which is afterwards recovered: The inſurer cannot recover back more than his proportion of the value of it, after deducting the expence of ſalvage.

(*a*) *Emerig.* tom. 2, p. 197.

inſurer)

inſurer) it was contended that by the recovery of the bullion, the contract was performed on the part of the inſurers; that the loſs could only be conſidered as a partial loſs, viz. the amount of the ſalvage; and that the agreement to allow the inſurer in the proportion of the ſum inſured to the whole intereſt, made no difference. —But the court were unanimouſly of opinion that the inſurer was not entitled to recover back the money he had paid to the inſured, but only his proportion of the value of the goods ſaved, after deducting the expence of ſalvage, which was the ſum paid into court.

An abandonment once properly made, upon a ſufficient ground, and accepted by the inſurers, is abſolute and binding upon both parties; nor can it be revoked but by mutual conſent (*a*). *Emerigon* ſays, that if a ſhip, by reaſon of ſea damage, be condemned as incapable of proceeding on her voyage, and the inſured abandon; but the ſhip, being refitted, is brought home at the expence of the inſurers; the inſurers cannot compel the inſured to take her back, but muſt pay the total loſs (*b*) —*Valin* holds a contrary opinion, and ſays that if the inſurers have not voluntarily paid the ſum inſured, they may, in ſuch caſe, oblige the inſured to take back the ſhip; the only queſtion between them being, as to the amount of the partial loſs (*c*). The opinion of *Emerigon* ſeems to be founded on the better reaſoning.

An abandonment once properly made is irrevocable.

But the abandonment is irrevocable only where it is made upon a ſufficient ground: And, therefore, if it appear to have been made upon a partial, and not a total loſs; or upon information that proves falſe or unfounded, it will be void *ipſo jure*. *Nam recte revocari, reſcindi, et retrahi dicitur, quod ipſo jure nullum eſt* (*d*).

But if it be not upon a ſufficient ground, it will be void.

(*a*) *Pothier*, h. t. n. 138. *Emerig.* tom. 2. p. 197.——(*b*) *Emerig.* tom. 2, p. 195.——(*c*) *Valin*, on art 60. h. t. p. 144.——(*d*) Vid. *Emerig.* tom. 2, p. 197.

Sect. V.

Of the ordering and diſpoſal of the Effects abandoned.

In caſe of misfortune, the inſured is bound to uſe his endeavours to ſave as much as poſſible.

IN caſe of ſhipwreck or other misfortune, the effects that are ſaved continue, till abandonment, the property of the inſured, who is bound in juſtice, honour, and conſcience, to uſe his utmoſt endeavours to make the moſt of what may be reſcued from deſtruction, in order, as much as poſſible, to lighten the burthen of the inſurers. To enable him to do this, without prejudice to his right of abandonment, our policies provide that,—'in 'caſe of any loſs or misfortune, the inſured, their fac- 'tors, ſervants, and aſſigns, ſhall be at liberty to ſue, 'and labour about the defence, ſafeguard, and recovery 'of the goods and merchandizes and ſhip, &c. with- 'out prejudice to the inſurance; *to the charges whereof,* '*the inſurers agree to contribute, each according to the rate and* '*quantity of his ſubſcription.*' The meaning of this clauſe is, that, till the inſured has been informed of what has happened, no act of the captain ſhall prejudice their right to abandon (*a*). There is a ſimilar proviſion in the policies of all other commercial countries, with a ſimilar undertaking on the part of the underwriters, to defray all expences, without limit, except in the policy uſed at *Marſeilles*, in which the inſurers only undertake to defray all expences occaſioned by the ſalvage, *provided they do not exceed the value of the effects ſaved;* a precaution as *Emerigon* obſerves, which prevents their being ever liable for more than the ſum inſured (*b*). This accords with the ſentiments of *Cleirac*, who ſays that the expences of the recovery of the effects ſaved, ought not to increaſe the loſs

(*a*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie*, ſup. 590.—(*b*) Vid. *Emerig.* tom. 2, p. 205.

beyond

beyond the ſum inſured (*a*). But this reſtriction has occaſioned many inconveniences both to the inſured and inſurers (*b*), which is the reaſon, perhaps, why it has not been adopted in any other place that I know of.

Duty of the captain in the care of what may be ſaved.

As to the captain, the ſhip and cargo being confided to his care, it is peculiarly his duty, in order that he may ſhew himſelf worthy of ſo great a truſt, to employ all his courage, ſkill, and induſtry, in the protection and preſervation of the one and the other.

His power.

From the nature of his ſituation, he has an implied authority, not only from the inſured, but alſo from the inſurers and all others intereſted in the ſhip or cargo, in caſe of misfortune, to do whatever he thinks moſt conducive to the general intereſt of all concerned; and they are all bound by his acts (*c*). Therefore, if the ſhip be diſabled by ſtreſs of weather, or any other peril of the ſea, the captain may hire another veſſel for the tranſport of the goods to their port of deſtination, if he think it for the intereſt of all concerned that he ſhould do ſo. Or he may, upon a capture, appeal againſt a ſentence of condemnation, or carry on any other proceedings for the recovery of the ſhip and cargo, provided he has a probable ground for doing ſo. Or, he may, upon the loſs of the ſhip, inveſt the produce of the goods ſaved in other goods, which he may ſhip for his original port of deſtination; and this, according to the doctrine of Lord *Mansfield* and Mr. Juſtice *Buller*, in the caſe of *Plantamour* v. *Staples* (*d*), ſhall bind the inſurers. For whatever is recovered of the effects inſured, the captain is accountable to the inſurers. If the inſured neglect to abandon when he has it in his power to do ſo, he adopts the acts of the captain, and he is bound by them. If, on the other hand, the inſurers, after notice of abandonment, ſuffer the captain to continue in the management, he becomes their agent, and they are bound by his acts (*e*).

When agent of either party.

(*a*) *Cleirac* ſur *Le Guidon*, ch. 20, art. 9.——(*b*) Vid. *Emerig.* tom. 2, p. 205,——(*c*) Per Lord *Mansfield* in *Mills* v. *Fletcher*, ſup. 578.——(*d*) Vid. c. 5, § 2, ſup. 170.——(*e*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie* ſup. 590.

Duty of the ſailors.

As to the *ſailors*,—when a misfortune happens, they are bound to ſave and preſerve the merchandize to the beſt of their power; and while they are ſo employed, they are entitled to wages, ſo far, at leaſt, as what is ſaved will allow: But if they refuſe to aſſiſt in this, they ſhall have neither wages nor reward. In this the *Rhodian* law (*a*), and the laws or *Oleron* (*b*), of *Wiſbuy* (*c*), and of the *Hans Towns* (*d*), all agree.

(*a*) ff. *de leg. Rhod.* art. 3.——(*b*) Art. 3.— (*c*) Art. 15.——(*d*) Art 44.

CHAP. XIV.

Of the Adjustment of Losses.

THE adjuſtment of a loſs is the ſettling and aſcertaining the amount of the indemnity which the inſured, after all proper allowances and deductions have been made, is entitled to receive, and the proportion of this, which each underwriter is liable to pay, under the policy. To aſcertain, with due preciſion, the amount of a loſs, is ſometimes a work of conſiderable difficulty: And though this is generally performed, without litigation, by perſons converſant with this branch of buſineſs, queſtions ſometimes ariſe, upon which the moſt experienced merchants cannot agree, and then the law muſt draw the line between them.

By the law of *England*, as it now ſtands, as well as by the general law of merchants, the contract of inſurance ought not to be lucrative to the inſured, nor enable him to make a profit out of the loſs of another. It ought to afford him an indemnity, and no more (*a*). The inſurer ought never to pay leſs, nor the inſured receive more, than that which a fair indemnity demands. And this ſhould be aſcertained, not upon ſubtilties and niceties, but upon plain and eaſy rules, the dictates of common ſenſe, drawn from the truth of the caſe.

In adjuſting a loſs, the firſt thing to be conſidered is, how the *quantity of the damage* for which the underwriters are liable, ſhall be aſcertained. This being known, the next, and generally the moſt difficult, point to be ſettled, is, by what rule this ſhall be *appreciated*. When theſe things are ſatisfactorily aſcertained, the adjuſtment is

(*a*) Vid. *Le Guidon*, ch. 2, art. 12. *Emerig.* tom. 1. p. 259.

uſually

uſually indorſed on the policy and ſigned by the underwriters. We will therefore conſider,

I. *How the quantity of damage ſhall be aſcertained;*
II. *How the loſs ſhall be appreciated;*
III. *What ſhall be the effect of an adjuſtment.*

Sect. I.

How the Quantity of Damage ſhall be aſcertained.

WHEN a loſs has happened, and it appears, under all the circumſtances, to be a total loſs, and the inſured decides to abandon, he muſt give notice of this to the underwriters in a reaſonable time, otherwiſe, as we have already ſeen(*a*), he will wave his right to abandon, and muſt be content to claim only as for a partial loſs.

When the policy is a valued one, and the loſs total.

When the loſs is admitted to be total, and the policy is a *valued* one, the inſured is entitled to receive the whole ſum inſured, ſubject to ſuch deductions as may have been agreed by the policy to be made in caſe of loſs. For the inſured, by allowing the value to be inſerted in the policy, agrees that it ſhall be taken as there ſtated; and it is the ſame as if he had admitted it at the trial of the cauſe (*b*).

Difference between the adjuſtment of an open and a valued policy.

It is only in the caſe of a total loſs that there is any difference between an open and a valued policy. Upon the latter, the value is admitted, and the inſured has only to prove, if the inſurance was on goods, that the goods valued were on board. Upon an open policy, it is not only neceſſary to ſhew that the goods were on board, but alſo to prove the *value* of them; which value, not exceeding the ſum inſured, is the ſum the inſurers are bound to pay.

But in the caſe of a *partial loſs*, the like inquiry is to be made into the amount of the loſs, whether the policy

(*a*) Sup. ch. 13, § 2.——(*b*) Vid. ſup. 287, 8.

be

be of the one ſort or of the other (*a*). The indemnity ſecured by either ſort of policy is, that if the thing inſured do not come ſafe to the port of deſtination, but is leſſened in value by damage received in the voyage from any of the perils inſured againſt, the loſs ſhall be borne by the inſurer.

Rule where the loſs conſiſts of one entire individual.

When the loſs conſiſts in the *total loſs* of one entire individual, parcel of the goods inſured, and this is capable of a ſeveral and diſtinct valuation; as if, out of 100 hogſheads of ſugar, ten happen to be loſt, and the reſt arrive ſafe; the inſurer muſt pay the value of the ten (*b*).

When part of the goods is ſaved.

When a part of the goods inſured is ſaved, and this exceeds the amount of the freight, the practice is to deduct the freight from the ſalvage, or goods ſaved, and to make up the loſs upon the difference. But where the freight exceeds the ſalvage, then it is a total loſs (*c*).

Where all the goods are damaged.

But where the goods inſured are damaged in the whole or in part, it becomes neceſſary to aſcertain the *quantity* of ſuch damage, which is done by taking the value of the goods, in their damaged ſtate, from the prime coſt, and the remainder will be the amount of the loſs.

Where ſeveral articles are inſured, and only one put in riſk.

If ſeveral articles be inſured for one entire ſum, but with a diſtinct valuation to each, and only one be put in riſk: If that one be loſt, the inſured ſhall recover ſuch a proportion of the ſum inſured, as the value of that article bore to the value of the whole.

Amery v. *Rogers*, 1 *Eſp.* Rep. 207

As, where the plaintiff wrote from *St. Kitts* to his agent in *London*, deſiring him to make inſurance on a ſhip and cargo to the amount of 5,500 l. valuing the ſhip at 1500l. Only 600 l. could be effected. No part of the cargo was ever put on board, ſo that in fact the policy attached only on the ſhip.—The ſhip being loſt, and an action brought on the policy, the above rule was contended for on the part of the defendant.—Lord *Kenyon*, who tried

(*a*) 2 *Bur.* 1171. Vid. ſup. 288.——(*b*) 2 *Bur.* 1170.——(*c*) Vid. *Boyfield* v. *Brown*, ſup. 587.

the

the cauſe, ſeemed to be of opinion that, as the whole ſum inſured was leſs than the value of the ſhip, the plaintiff was entitled to the whole.—But the jury having intimated that the rule, as laid down by the defendant's counſel, was that which prevailed in ſuch caſes at *Lloyd's* coffee houſe, his lordſhip aſſented to their giving a verdict for ſuch a proportion of the ſum inſured as the value of the ſhip bore to the value of both ſhip and cargo.

When there is a clauſe to be free of average under ſo much *per cent.* how that proportion ſhall be aſcertained.

If there be a clauſe in the policy, to be free of average from a particular riſk under ſo much *per cent.* and a loſs occaſioned by that riſk take place; the proportion which the loſs bears to the cargo, muſt be calculated upon the cargo which was on board when the loſs happened, not upon that which was on board at any other time.

Rhiel v. *Parr*, 1 *Eſp.* Rep. 444, Sup. 492.

Thus:—In a policy on a ſlave ſhip, there was a memorandum, to be free of average under 5 *per cent.* for loſs by inſurrection of the ſlaves.—An inſurrection took place when there were only 49 ſlaves on board. Seven of theſe were killed.—As this loſs muſt amount to 5 *per cent.* to make the underwriters liable, it became a queſtion, at what time the proportion which the loſs bore to the cargo ſhould be taken;—whether at the time when the inſurrection took place, and the loſs happened, or when the whole cargo was on board. Upon examination of perſons acquainted with the practice in ſuch caſes, it was found that the time when the calculation was to be made, was, *when the loſs happened*, at which time, the proportion of the loſs to the cargo *then on board*, was to regulate the loſs to be borne by the underwriters.

Sect. II.

How the Loſs ſhall be appreciated.

What ſhall be deemed the true price of a thing.

THE true price of a thing is that for which things of the like nature and quality are uſually ſold in the place where they are ſituated, if real property; or in the place where they are expoſed to ſale, if perſonal (*a*).

(*a*) *Pothier, Des Ventes*, n. 242.

The firſt price of a thing does not always afford a ſure criterion to aſcertain its true value. It may have been bought very dear, or very cheap. The circumſtances of time and place cauſe a continual variation in the price of things. For this reaſon, in caſes of general average, the things ſaved contribute, not according to the prime coſt, but according to the price for which they may be ſold at the time of ſettling the average. *Non quanti emptæ ſunt, ſed quanti veniri poſſunt*, is the rule of the *Rhodian* law (*a*). The ſame is adopted in the laws of *Wiſbuy* (*b*).

The firſt price is not always the true value.

Averages are ſettled according to the price at the time of ſettling.

Upon the ſubject of the valuation of the goods inſured there has always been a great diverſity of opinion, not only among ſpeculative writers, but alſo among merchants themſelves. Some contending for the prime coſt, others for the current price at the time of the loſs; ſome inſiſting on the price at the time and place where the goods are ſhipped, others on the price at the port of diſcharge (*c*).

Different modes of appreciating a loſs.

In *France*, where almoſt all policies are valued, the inſured has his election to fix the previous valuation, either at the prime coſt, or at the current price at the time and place of loading. If the goods be of the growth or manufacture of the inſured, the latter valuation is always adopted (*d*). The ſame rule that applies to goods, applies alſo to the ſhip, which is always valued at the ſum ſhe is worth at the time of her departure (*e*), or at leaſt at the commencement of the riſk.—If goods, by being brought *from a diſtance*, are augmented in value, they may be eſtimated at their improved value, and an invoice made accordingly; nor ſhall the inſured be obliged to produce his original accounts, having a right to inſure the profit already acquired; and the inſurer muſt either abide by the invoice made by the inſured, or require a valuation by

How the valuation is made in *France*.

Goods brought from a diſtance may be valued at their improved price.

(*a*) ff *de leg. Rhod.* l. 2, § 4. —— (*b*) Laws of *Wiſb.* art. 20. and 39. Vid. *Santerna*, h. t. par. 3. n. 40. *Roccus*, n. 31.—— (*c*) Vid. *Emerig.* tom. 1, p. 261. ——(*d*) Vid *Ord. de la mar.* h. t. art. 64, and *Valin* on this art. *Emerig.* tom. 1, p. 262. —— (*e*) Vid. *Emerig* tom. 1 p. 263.

ſkilful

ſkilful perſons according to the *current prices of the time and place*.—It is uſual in *France* to ſtipulate in the policy that the ſhip ſhall remain of the ſame value during the voyage; which is the reaſon why *Valin* (*a*) ſays, that where the ſhip is abandoned, the *freight*, which augments in the ſame degree as the ſhip is deteriorated in value, is alſo abandoned, as being an inſeparable incident to the ſhip (*b*).

In *England* the proper value conſiſts of the prime coſt and all charges.

In *England*, if the policy be an open one, it is an invariable rule to eſtimate a total loſs, not by any ſuppoſed price which the goods might have been deemed worth, at the time of the loſs, or for which they might have been ſold, had they reached the market for which they were deſtined; but according to the *prime coſt*, that is, the invoice price, and all duties and expences incurred till they are put on board, together with the premium of inſurance. This is the only true, at leaſt the only legal, mode of eſtimating a loſs, whether total or partial, on goods; and, therefore, whether the goods would have arrived at a good or a bad market is always immaterial (*c*). Neither is the difference of exchange to be at all regarded in the adjuſtment; for the underwriter does not inſure againſt any loſs ariſing from ſuch cauſes (*d*).

The value is never affected by the riſe or fall of the market, or the courſe of exchange.

It might, with ſome degree of plauſibility, be inſiſted that the prime coſt, after a long voyage, and when the goods inſured had almoſt reached a market where they would have ſold for a great profit, does not amount to an *indemnity*; for, beſide the loſs of the profit the merchant might reaſonably have expected, he alſo loſes all the benefit he could have derived, from the uſe of his money in any other adventure. Upon this principle the *Conſolato del mare* (*e*), in laying down rules for average contributions, declares that if the goods be loſt before half the voyage is performed, they are to be valued only at prime

(*a*) On art. 8. and 64, h. t. p. 56, 136. — (*b*) Vid. ſup. ch. 13, § 4.——(*c*) Per *Buller*, J. at N. P. in *Dick* v. *Allen*, after Mich. 1785, *Park* 104.——(*d*) Per Lord *Kenyon* in *Thelluſſon* v. *Bewick*, at N. P. 1 *Eſp.* Rep. 77.——(*e*) Ch. 95.

coſt; but, if after, then at the price at which they might have been ſold at the port of delivery.—However reaſonable this rule may be, abſtractedly conſidered, and as applied to average contributions, it would be more than counter-balanced by the litigation it would occaſion, to decide, in queſtions of inſurance, whether the voyage was half performed; or, if that were indiſputable, then, what was the market price at the port of delivery. But, be this as it may, it is the invariable rule in this country, upon an open policy to eſtimate a total loſs upon goods, by adding to the prime coſt, all duties and expences and the premium of inſurance; for this has conſtantly been deemed a full indemnity to the inſured.

How a ſhip ſhall be valued.

A ſhip is valued at the ſum ſhe is worth, at the time ſhe ſails on the voyage inſured, including the expences of repairs, the value of her furniture, proviſions and ſtores, the money advanced to the ſailors, and, in general, every expence of the out-fit; to which is added the premium of inſurance (*a*).

When goods are damaged in the courſe of the voyage, the amount of the loſs is that proportion of the prime coſt which the price of the damaged bears to the price of the ſound in the port of delivery.

A partial loſs upon either ſhip or goods, is that proportion of the prime coſt, which is equal to the diminution in value occaſioned by the damage.—In the caſe of a partial loſs upon goods damaged in the courſe of the voyage, much doubt has ariſen as to the rule or meaſure by which the damage ought to be appreciated. Where the goods have come to a good market, it has been contended that the inſured is intitled to *the difference between the price for which the damaged and undamaged goods have been ſold at the port of delivery*; and that, where the goods have come to a fallen market, the inſured ought to receive *the difference between the price of the damaged goods, at the port of delivery, and the prime coſt or value in the policy*. But this would neceſſarily involve the underwriter in the riſe or

(*a*) By *Ord. de la mar.* h. t. art. 20, the premium cannot be added to the other charges, yet the allowance of it is ſupported by the authority of *Le Guidon*, ch. 2, art. 9, ch. 15, art. 3, 13, 15, and the practice of all commercial nations.

fall

fall of the market. Beſides, the difference between the price of the ſound and damaged goods, in a riſen market, might amount to more than the invoice price. For inſtance; ſuppoſe the prime coſt of a quantity of goods to be 200l., which, coming ſound to the port of delivery, would ſell for 300l., but, being damaged, would ſell for only 50l.; the difference would be 250; which is more than the prime coſt. The true rule is, that the inſured is only intitled to *that proportion of the prime coſt which the price of the damaged bears to the price of the ſound at the port of delivery*; thus, uſing the relative prices of the damaged and ſound commodity, at the port of delivery, as a criterion to aſcertain the proportion of the prime coſt which the underwriter is bound to pay.—As, if goods, valued at 100l., and coming to a *good market*, would, if ſound, have been ſold for 120 l.; but are ſo damaged as not to fetch more than 40 l.: Then, according to the above rule contended for by the inſured, the loſs would be 80 l. *per cent*: But, according to the rule now eſtabliſhed, the loſs would be that proportion of the prime coſt (100l.) which the difference between the price of the damaged and the price of the ſound goods (80l.) bears to the price of the ſound (120l.): Thus:—If 120l: 80l:: 100l.:—the anſwer is 66l. 13s. 4d., the true loſs.—But, if the damaged goods had come to a *fallen market*, and had fetched only 30 l. and theſe, if ſound, would have been worth 90l.; the inſured, according to the above exploded rule, could claim only 60l. *per cent.*; but, according to the true rule, he would be entitled to that proportion of 100l. which 60l. bears to 90l., namely 66l. 13s. 4d.—This will be found fully exemplified in the following caſe.

Lewis v. *Rucker*, 2 *Bur.* 1167.

An inſurance was made upon goods, 'At and from 'the iſland of *St. Thomas* to *Hamburgh*, from the loading 'at that iſland, till the ſhip ſhould arrive and land the 'goods at *Hamburgh*.'—The goods which conſiſted of ſugars, coffee, and indigo were valued; the clayed ſugars at 30 l. per hogſhead, *Muſcovado* at 20 l.; and the coffee and indigo were alſo valued. Sugars were, as uſual, warranted free from average under 5 l. *per cent.* and all other

Sugars *valued* at 30 l. *per* hogſhead are ſo damaged in the voyage, that they are ſold at the port of delivery, for 20l. 0s. 8d. *per* hogſhead, but, if ſound, would

other goods under 3 l. *per cent.* unleſs general, or the ſhip ſhould be ſtranded.—In the voyage the ſea water got in; and when the ſhip arrived at *Hamburgh*, it appeared that every hogſhead of ſugar was damaged; ſo that it became neceſſary to ſell them immediately at *Hamburgh*: And the difference between the price they ſold for, and what they would have fetched there, had they been ſound, was as 20l. 0 s. 8 d. per hogſhead, is to 23 l. 7 s. 8 d. That is, they were ſold for 3 l. 7s. per hogſhead leſs than they would have been worth, had they been ſound.—The defendant paid into court that proportion of the ſum at which the ſugars were *valued in the policy*, which the price of the damaged bore to that of the ſound ſugars at *Hamburgh* (*a*).—The only queſtion was, by what meaſure or rule the damage ought to have been eſtimated.—The plaintiff proved that, at the time of the inſurance, ſugars were worth 35 l. per hogſhead at *Hamburgh*; but that the expectation of a peace had ſuddenly ſunk them; that the owner of the ſugars, before the ſhip arrived at *Hamburgh*, and before he could know that they were damaged, had ſent orders that they ſhould be houſed there till the price ſhould riſe above 30 l. per hogſhead; that, in fact, the negociation not taking place, ſugars did not riſe 25 l. *per cent*; that he might have ſold theſe ſugars at 30 l. per hogſhead, if they could have been kept, and the damage

have fetched 23 l. 7 s. 8 d.; ſo that the difference was 3 l. 7 s. *per* hogſhead. The loſs in this caſe, is that proportion of 30 l. (the value in the policy) which 3 l. 7s. (the difference between damaged and ſound at the port of delivery) bears to 23 l. 7 s. 8 d. the price of the ſound at the port of delivery.—The amount of the loſs does not depend on the prices in the market at the port of delivery: But the proportion of the *prime coſt* which the loſs amounts to, may be aſcertained, by the prices which the damaged and ſound bear to each other in the port of delivery.

(*a*) The reporter of this caſe makes Lord *Mansfield* ſtate that the ſum paid into court bore the like proportion to the ſum at which the ſugars were valued in the policy, (30l.) as the price of the damaged ſugars (20l. 0s. 8d.) bore to the price of the ſound at *Hamburgh* (23 l. 7s. 8 d.). This, by a common operation of arithmetic, would be 25 l. 14 s. per hogſhead, which ſhews that the rule by which the money was paid into court, is not correctly ſtated in the report. The ſum paid into court muſt have borne the ſame proportion to 30 l. as 3 l. 7 s. (the difference between the ſound and damaged ſugars at *Hamburgh*) bore to 23 l. 7 s. 8d. (the price of the ſound there). This comes to 4l. 5s. 11½d. per hogſhead the real amount of the loſs, according to the principles laid down by Lord *Mansfield*, in delivering the opinion of the court.

mage they had received was the only reaſon why they were not kept. The plaintiff, therefore, inſiſted that the neceſſity of an immediate ſale, and the loſs ſuſtained by it, ought to have been taken into the account in computing the damage.—Lord *Mansfield*, who tried the cauſe, left it to the jury to decide, *whether the difference between the ſound and the damaged ſugars, at the port of delivery*, ought to be the rule: Or, whether *the loſs occaſioned by an immediate ſale*, ſhould be taken into conſideration. The jury, amongſt whom were many conſiderable merchants, who perfectly underſtood the ſubject, and formed their judgment from their own experience, found the defendant's rule of eſtimation to be right, and gave their verdict for him accordingly.—Upon a motion for a new trial, the court were unanimouſly of opinion that the plaintiffs were not entitled to have the price for which the damaged ſugars were ſold, made up to 30l. per hogſhead; and that the rule by which the jury had gone was the right meaſure.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"The rule by which the defendant and the jury have gone is this:—The defendant takes the proportion of the difference between ſound and damaged ſugars in the port of delivery, and pays that proportion upon the value of the goods ſpecified in the policy; and has no regard to the price, *in money*, which either ſound or damaged ſugars bore at the port of delivery. He ſays the proportion of the difference is equally the rule, whether the goods came to a riſing or a falling market. For inſtance; ſuppoſe the prime coſt or value in the policy to be 30l. and the damaged goods ſell for 40l.; but, if ſound, would have ſold for 50l.; the difference is a fifth: The inſurer muſt therefore pay a fifth of 30l:—*E converſo*, if they come to a loſing market, and, being damaged, ſell for 10l.; but if ſound would have ſold for 20l.; the difference is one half: The inſurer muſt therefore pay 15l. that is half the prime coſt or value in the policy. Two objections have been made to this rule: *Firſt*, that it is going by a different meaſure in the caſe of a *partial*, from that which governs in the caſe of a *total*, loſs; for, upon a total loſs, the prime coſt, or value in the policy,

This rule equally holds whether the goods come to a riſing or a falling market.

muſt be paid.—The anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore if the thing be totally loſt, the inſurer muſt pay the whole value which he inſured at the out-ſet. But, where a *part* of the commodity is ſpoiled, no meaſure can be taken from the prime coſt to aſcertain the quantity of the damage ſuſtained. The only way is to aſcertain whether the thing be a third or a fourth worſe than the ſound commodity; and then pay a third or fourth of the prime coſt or value of the goods ſo damaged (*a*). The *ſecond* objection is, that this being a valued policy, was in nature of a *wager*; and if ſo, there could be no *partial* loſs, and the inſured could only abandon and recover as for a total loſs; becauſe the value ſpecified was fictitious." —In anſwer to this objection, his Lordſhip ſaid,—"To argue that there can be no adjuſtment of a partial loſs upon a valued policy, is directly contrary to the very terms of the policy itſelf. It is expreſsly provided that the article of *ſugar* ſhall be ſubject to *average*, if the loſs exceed 5 *per cent.*; and even if it were not ſubject to average the conſequenee would be that every partial loſs muſt thereby become total: But then, the inſured could only recover in the event of a total loſs; and conſequently the plaintiffs in this caſe would not be entitled to recover at all; for there is no colour to ſay that this was a total loſs; beſides the plaintiffs have taken the goods and ſold them. In oppoſition to the meaſure which the jury have gone by, the plaintiffs con-

(*a*) Lord *Mansfield*, in this anſwer to the firſt objection, ſeems, according to the report, to have been labouring to account for the ſuppoſed difference between the meaſure in the caſe of a partial and a total loſs. But with great deference, it would ſeem that the rule to which the objection is made, and which fixes the proportion of the *prime coſt* which muſt be paid in caſe of a partial loſs, is not inconſiſtent with, but is founded upon, the practice of paying the whole of the prime coſt upon a total loſs.

tend that they ought to be paid the *whole value in the policy*, upon one of two grounds. 1ſt. That the general rule of eſtimating ſhould have been the difference between the price the damaged goods ſold for, and the prime coſt, or value in the policy. Here the damaged goods ſold for 20 l. 0 s. 8 d. per hogſhead; and the underwriters ſhould make it up 30 l.—To this I anſwer, that it would involve the underwiter in the riſe or fall of the market; and, in ſome caſes, ſubject him to pay vaſtly more than the loſs; in others it would deprive the inſured of any ſatisfaction, though there were a loſs.—For inſtance; ſuppoſe the prime coſt, or value in the policy, 30l. per hogſhead; the ſugars damaged; the price of the ſound 20l.; the price of the damaged 19 l. 10 s.: The loſs is about a *fortieth*, and the inſurer would be obliged to pay above a *third*. Snppoſe they come to a riſing market; the ſound ſugars ſell for 40l.; the damaged for 35 l: The loſs is an *eighth*; yet the inſurer would have to pay nothing.—The 2d ground upon which the plaintiffs contended that the 30l. ſhould be made up, was that it appeared that the ſugars *would* have ſold for that price, if the damage had not made an immediate ſale neceſſary. The moment the jury brought in their verdict, I was ſatisfied they had done right in diſregarding the *particular circumſtances* of this caſe; and I was convinced of this, after converſing with perſons of experience in adjuſtments, and after the ſubject had been fully argued at the bar. The nature of the contract is, that the goods ſhall come ſafe to the port of delivery; or if not, that the inſurer will indemnify the inſured to the amount of the prime coſt. If they arrive, but leſſened in value by damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be, by putting the inſured in the ſame ſituation, (relation being had to the prime coſt, or value in the policy), which he would have been in, if the goods had arrived free from damage; that is, by paying ſuch *proportion*, or *aliquot part*, of the *prime coſt*, or value in the policy, as correſponds with the proportion, or aliquot part, of the *diminution in value* occaſioned by the damage. The duty accrues upon the ſhip's arrival

An inſurer is never to be involved in the riſe or fall of the market.

The indemnity ſecured by the policy is ſuch an aliquot part of the prime coſt as correſponds with the diminution in value occaſioned by the damage.

and landing her cargo at the port of delivery, and the insured has then a right to demand satisfaction. The adjustment can never depend upon future events or speculations: How long is he to wait; a week, a month, or a year?—In this case, the price rose; but, if peace had been made, the price would have fallen: But the defendant did not insure that there should be no peace. It is true that the owner acted upon political speculation, and ordered the sugars to be kept till the price should be 30 l. or upwards: But no private scheme or project of trade of the insured can affect the insurer: He knew nothing of it: He did not undertake that sugars should bear a price of 30 l. a hogshead. If speculative distinctions of the merchant, and the success of such speculations, were to be regarded, it would introduce the greatest injustice and inconvenience. The insurer knows nothing of them. Here the orders were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery."

The duty accrues upon the ship's arrival and landing her cargo; and does not depend on future contingencies.

No speculation of the insured can increase or diminish the amount of the loss.

In the above case it was settled that the relative prices of the sound and unsound goods at the port of delivery furnished the true basis for calculating the proportion of the prime cost which the insurer is to pay in case of a partial loss. But it has since been made a question, what are to be taken as the prices of the sound and damaged goods, from which the calculation shall be made? Upon that question it has been determined that the respective prices of the damaged and the sound commodity are not to be taken from the *net proceeds*, but from the *gross produce* of each, at the port of delivery.

Thus, where an action was brought on a policy upon goods insured from *Sicily* to *Hamburgh* to recover a partial loss occasioned by the sea water having damaged the goods.—At the trial it was referred to one of the jury to ascertain the amount of the loss, who settled it at 76 l. 7 s. 4 d. *per cent.*—There was a motion for a new trial upon the ground that this calculation had proceeded

Johnson v. *Sheddon*, 2 *East* 581.

The prices of the sound and damaged goods are not to be taken from the net proceeds, but from the gross produce at the port of delivery.

ceeded on a miſtake, the perſon who made it having taken for his foundation, the difference between the *net proceeds* of the damaged goods, and what they would have produced if ſound; inſtead of the difference between the *groſs* produce of each.—The court determined that the calculation was wrong, and the objection well founded. Mr. Juſtice *Lawrence*, who delivered the opinion of the court, ſaid,—"It is agreed on both ſides that the loſs is to be eſtimated by the rule laid down in *Lewis* v. *Rucker*(*a*); that the underwriter is not to be ſubjected to the fluctuation of the market; that the loſs for which he is reſponſible, is that which ariſes from the deterioration of the commodity by ſea damage; and that he is not liable for the duties or charges payable at the place of delivery. Lord *Mansfield*, in laying down the rule, in that caſe, ſpeaks of the *price* of the thing at the port of delivery, as the means of aſcertaining the damage; by which he muſt mean the *whole* ſum which is to be paid for the thing: For the net proceeds are not the price, but only ſo much of the price as remains after the deduction of certain charges. His lordſhip cannot mean the price before the maſt, leaving the purchaſer liable to the payment of further ſums; for ſuch payment is in effect but a part of the price, and is not an equivalent for the thing ſo ſold: For if the purchaſer were not liable to the duties and charges, we would give as much more as the amount of thoſe charges comes to. The prime coſt and thoſe charges conſtitute the price. One objection to taking the net proceeds, inſtead of the groſs proceeds, as the baſis of the calculation, is, that where equal charges are to be paid on the ſound and damaged commodity, the underwriter will be affected by the fluctuation of the market. For if two equal quantities be taken from two unequal quantities, the ſmaller the unequal quantities are, the greater will be the difference between the remainders. But whether the goods come to a riſing or a falling market, the deterioration muſt be the ſame, and the underwriter ſhould pay the ſame; which he will do, if the groſs pro-

(*a*) Sup. 537.

duce

duce of the ſound and unſound be taken as the ſubject of compariſon. Therefore the prices upon a ſale before the maſt, when equal duties are to be paid, do not correſpond with the true proportion between the ſound and the unſound commodity, or ſhew in what degree the one is inferior in value to the other."

Harry v. Roy, Ex. Aff. 3 *Beſ. & Pul.* 308. S. P.

The ſame queſtion came before the court of *Common Pleas* in *Michaelmas* Term 1802, when that court fully approved the rule ſo ably laid down by Mr. Juſtice *Laurence*; and determined that the loſs muſt be calculated upon the groſs proceeds, and not upon the net proceeds, of the goods inſured, at the port of delivery.

If the value in the policy exceed the intereſt, the computation muſt be made by the real intereſt, not by the value in the policy.

Where there is a partial loſs upon a valued policy, but the value in the policy *exceeds the intereſt of the inſured*, it is the conſtant uſage to adjuſt a partial loſs in the ſame manner as if the policy were *an open one*; and the computation muſt therefore be by the *real intereſt* on board, and not by the value in the policy.

Le Cras v. Hughes, B. R. E. 22 *G.* III. MS.

Thus, where an inſurance was made on a ſhip and goods on board,—'At and from *Omoa* to *London*; *valued at the 'ſum inſured.*' There was no value mentioned in the body of the policy, but only the ſums wrote againſt the different names on the back. There were other policies on the ſame ſhip and goods, amounting in the whole to 99,500 l. which exceeded the amount of the intereſt of the inſured (*a*). The ſhip and a great part of the cargo were loſt, about one tenth only of the goods being ſaved. One queſtion at the trial of this cauſe was, how the loſs, which was conſidered as a partial one, ſhould be adjuſted (*b*). The broker ſwore that, on ſuch policies as

(*a*) The ſhip and goods inſured had been captured by ſea and land forces jointly. The inſurance was on behalf of the officers and crews of the ſhips; but as the land forces were entitled to a ſhare in this prize, the ſum inſured though leſs than the value of the ſhip and goods, was found to be more than the intereſt of the inſured. Vid. ſup. ch. 4. § 1, 2.——(*b*) The principal queſtion was, whether the inſured had an inſurable intereſt in the ſhip and goods. For this vid. ſup. 108, where there is a fuller report of this caſe.

this, where a *total loſs* happened, the whole ſum was paid: But where it was only a partial loſs, they conſidered it as an open policy, and paid a proportion, not of the ſum inſured, but of the value of the goods.—The court of King's Bench, when this caſe came before them, thought it, at firſt, like that of *Lewis* v. *Rucker* (*a*) But the intereſt of the inſured, in the ſhip and goods, being leſs in value than the ſum inſured, the court held that this caſe differed from that of *Lewis* v. *Rucker*, and that the conſtant uſage in ſuch caſes was, upon a total loſs, to pay the whole (*b*); but, upon a partial loſs, to conſider it as an *open policy*. The court were therefore of opinion that the computation in this caſe muſt be by the *real intereſt* of the inſured on board, and not by the value in the policy.

The true ground of diſtinction between this caſe and that of *Lewis* v. *Rucker* is, that, in that caſe, the value in the policy was conſidered as the *prime coſt*, and this was never diſputed; whereas, in this caſe, it appears that the intereſt of the inſured was conſiderably leſs than the value in the policy.

Sect. III.

What ſhall be the Effect of an Adjuſtment.

An adjuſtment ſigned by the underwriters is *primâ facie* evidence againſt them, and ſufficient of itſelf, if not impeached, to entitle the inſured to recover without any other proof.

AN adjuſtment being indorſed on the policy and ſigned by the underwriters with the promiſe to pay in a given time, is *primâ facie* evidence againſt them, and amounts to an admiſſion of all the facts neceſſary to be proved by the inſured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved, the inſured has no occaſion to go into proof of any other circumſtance. This was the opinion of Lord C. J. *Lee* in the following caſe.

(*a*) Sup. 624.——(*b*) Vid. ſup. 287.

Hog v. *Gouldney*, at N. P. after Trin. 1745, at G. H. *Beawes* 310.

An inſurance was made on a ſhip, 'At and from 'Jamaica to *London*, intereſt or no intereſt, and without 'benefit of ſalvage, with a warranty that the ſhip ſhould 'ſail with convoy.'—The ſhip ſailed with convoy, but was ſo much damaged in the voyage, that ſhe was obliged to bear away for *Charleſton*, where ſhe was condemned and broke up.—All the underwriters, being ſatisfied of the truth of this caſe, paid their loſſes, except the defendant, who went ſo far as to ſettle it, and according to the cuſtom upon ſuch occaſions, indorſed the policy in theſe words;—"Adjuſted the loſs on this policy at "98l. *per cent.*, which I agree to pay one month after "date. *London*, 5th *July* 1745. *Henry Gouldney.*"—When the money became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation.—An action was brought on the policy; and Lord C. J. *Lee*, who tried the cauſe, was of opinion that this was to be conſidered as a note of hand, and that the plaintiff had no occaſion to enter into the proof of the loſs. The jury found a verdict for the plaintiff.—The ſame rule was followed, the next year, by the ſame learned judge, in the caſe of *Hewitt* v. *Flexney* (*a*).

This rule objected to.

It has been obſerved that the words uſed by Lord Chief Juſtice *Lee*, in this caſe, were *extremely large* (*b*); and that the true rule upon the ſubject might be better collected from two ſubſequent caſes, which will be mentioned hereafter. The words which are ſuppoſed to be too large are, "That the memorandum indorſed on "the policy, was to be conſidered as a note of hand, "and that the plaintiff had no occaſion to enter into the "proof of the loſs."—It is not eaſy to diſcover in what reſpect the rule here laid down is too large. The memorandum indorſed on the policy, and ſigned by the defendant, unqueſtionably amounts to an admiſſion of his ſubſcription to the policy; of the plaintiffs intereſt in the ſhip inſured, (if the terms of the policy had not rendered that unneceſſary); of her having ſailed with convoy; of a loſs having happened, and that the amount of that

The rule vindicated.

The adjuſtment admits the whole caſe, and like a note of hand, is *primâ facie* evidence of a debt.

(*a*) *Beawes* 308.—(*b*) *Park* 118.

loſs

loſs was the ſum ſpecified in the adjuſtment, which contains a promiſe to pay in one month. This, like a note of hand, is *primâ facie* evidence of a debt; and it ſeems to be as unneceſſary for the plaintiff, in an action on the policy, to prove the facts admitted by the adjuſtment, as to prove the conſideration of a note of hand, before it is impeached.—But in neither caſe is "*the door ſhut againſt inquiry.*" A note of hand is not *concluſive* evidence of a conſideration, though value received be expreſſed in it. On the contrary, it may be impeached by ſhewing that it was made upon an unlawful, or corrupt conſideration, or without any conſideration at all. So, an adjuſtment, like that which is ſtated in the foregoing caſe, may be impeached by ſhewing that the underwriter was induced to ſign it by ſome fraud or concealment, or by ſome miſconception of the law or fact. But, in either caſe this muſt be done by *evidence*, and not by *doubts or ſurmiſes* after the time for payment is come; nor can the plaintiff be put under the neceſſity of proving the conſideration of the note, in the one caſe, or the facts admitted by the adjuſtment, in the other, until a ſtrong ground of ſuſpicion, at leaſt, be raiſed againſt it by *evidence* on the part of the defendant.

It is not, however, concluſive, but may be impeached by evidence.

In the firſt of the two caſes adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, a loſs had been adjuſted at 50l. *per cent.*, and an action was brought on the policy.—It was contended on the part of the defendant, that the adjuſtment was not binding; but that, if it were, it ought to have been declared on *ſpecially*.—Lord *Kenyon*, who tried the cauſe, was of opinion that it was not neceſſary to declare ſpecially. He ſaid that the adjuſtment was *primâ facie* evidence againſt the defendant: But if there had been any miſconception of the law or fact upon which it had been made, the underwriter was not *abſolutely concluded* by it.—This turned out to be the caſe, and there was a verdict for the defendant.

The adjuſtment may be given in evidence in an action on the policy; and the inſured is not obliged to declare ſpecially on it.

Rodgers v. *Maylor*, at N. P. after Trin. 1790, *Park* 118. *Sheriff* v. *Potts*, 5 *Eſp.* N. P. Rep. 96. S. P.

It is *primâ facie* evidence againſt the underwriter; but he may impeach it.

The doctrine of Lord *Kenyon*, in this caſe, far from ſhaking, or even narrowing the rule, as laid down by Lord C. J. *Lee*, ſeems, on the contrary, to have ſtrongly confirmed it. Lord *Kenyon* ſays, that if there had been

any

any miſconception of the law or fact upon which the adjuſtment had proceeded, the underwriter would not have been *abſolutely concluded* by it. It is plain, then, that he conſidered the adjuſtment like a note of hand, as *primâ facie* evidence of a debt, but not concluſive, ſince the adjuſtment, like a note of hand, might be impeached by evidence on the part of the defendant.

In the ſecond caſe adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, it is ſtated that the plaintiff went to trial, having no evidence to produce but the adjuſtment; and the witneſs who proved it, ſwore that, ſoon after they had ſigned it, *doubts aroſe in the minds of the underwriters*, and they refuſed to pay; upon which, Lord *Kenyon* ſaid that, under theſe circumſtances, the plaintiff muſt go into other evidence; and not being able to do this, he was nonſuited.—In the following term, a motion was made to ſet aſide this non-ſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.—Lord *Kenyon* ſaid;—"I admit the adjuſtment to be evidence in the cauſe to a certain extent: But I thought at the trial, and ſtill think, that when the ſame witneſs who proved the ſignature of the defendant to the adjuſtment ſaid, that, ſoon after the adjuſtment took place, doubts aroſe in the minds of the underwriters, *as to the honeſty of the tranſaction*, and they called for further proof, the plaintiff ſhould have produced other evidence; and that, ſhutting the door againſt enquiry, after an adjuſtment, would be putting a ſtop to candour and fair dealing amongſt the underwriters.—Accordingly the court refuſed to grant a new trial.

De Garron v. *Galbraith*, at N. P. after Trin. 1795. *Park* 118.

In the account of what paſſed at the trial of this cauſe, it does not appear upon what ſubject the doubts aroſe in the minds of the underwriters, nor at what time the further proof was called for. It would ſeem, from the above report, that further proof was only called for at the trial, by the learned judge who tried the cauſe. It is unfortunate that there is no account of this caſe in the term reports, the ſixth volume of which contains the caſes of the term in which

Whether this caſe can be deemed a ſufficient authority to narrow the rule laid down by Lord C. J. *Lee*.

which it is ſaid to have come before the court. It is to be preſumed that an accurate ſtatement of the evidence on which the plaintiff was nonſuited, would have clearly ſhewn that the deciſion of the learned judge at *niſi prius*, and afterwards of the court of King's Bench, was correctly right; that juſtice was done; and that, under the particular circumſtances of the caſe, this might have been a very proper exception to the rule, as laid down by Lord C. J. *Lee*. But as the caſe ſtands, in the above report of it, it would be very difficult to reconcile it, even to the deciſion of Lord *Kenyon* himſelf, in the above caſe of *Rodgers* v. *Maylor* (*a*); nor can it be accounted for, upon any known principle of law, that an underwriter, who had ſigned an adjuſtment of a loſs, with a promiſe to pay it, might afterwards, merely becauſe he choſe to alledge that *doubts had ariſen in his mind*, refuſe to pay the ſum he had acknowledged to be due; and that, merely on the ſuggeſtion of theſe doubts, the inſured ſhould be called upon, at the trial, to prove his whole caſe, at a time, too, when it was no longer, perhaps, in his power to procure the neceſſary evidence. The candour and fairneſs which ought to preſide in the litigation of all commercial queſtions, would never go the length of requiring this. If, indeed, the underwriters, harbouring theſe doubts, ſhould give the inſured reaſonable notice of their intention to diſpute his claim, it would be competent to them, perhaps, to do ſo; and even then, they ought to come prepared to ſhew ſome fraud or concealment on the part of the inſured; or ſome miſconception of the law or the fact, on their own part, which had induced them to agree to the adjuſtment. This would make an end of the adjuſtment, and it would then be incumbent on the inſured, under whatever difficulty, to go into the proof of his whole caſe. It is poſſible, nay, very probable, that this, or ſomething like it, appeared in the caſe of *De Garron* v. *Galbraith*. But, as that caſe is reported, it cannot be deemed of ſufficient weight or authority to alter or ſhake the rule as laid down

(*a*) Sup. 634.

in the caſe of *Hog* v. *Gouldney*; and which, as has been already obſerved, is greatly enforced and confirmed by Lord *Kenyon*, in the caſe of *Rodgers* v. *Maylor* (*a*).

But it is ſaid, that the ſpirit of the rule laid down in this laſt caſe, was adopted in the *very modern* caſe of *Thelluſon* v. *Fletcher* (*b*), which has been already fully ſtated (*c*). The only point determined in that caſe at all applicable to the preſent ſubject was, that, if an underwriter ſuffer judgment to go by default, he thereby confeſſes the plaintiff's title to recover, and the plaintiff ſhall not, therefore, be obliged to prove his intereſt; a point about which, without that deciſion, no lawyer could have entertained much doubt.—All that can be ſaid on this determination is, that, as far as it can be ſuppoſed to bear on the preſent queſtion, it corroborates the rule as laid down by Lord C. J. *Lee*.

(*a*) Vid. *Chriſtian* v. *Combe*, 1 *Eſp.* Rep. 486, where Lord *Kenyon* lays down the ſame doctrine.——(*b*) *Thelluſon* v. *Fletcher* was determined 16 years *before* the caſe of *De Garron* v. *Galbraith* ——(*c*) Sup. 129.

CHAP. XV.

Of Return of Premium.

THE premium paid by the inſured, and the riſk which the inſurer takes upon himſelf, are conſiderations, each for the other: they are co-relatives, whoſe mutual operation conſtitutes the eſſence of the contract of inſurance. The inſurer ſhall not be expoſed to the riſk, without receiving the premium; nor ſhall he retain the premium, which was the price of the riſk, if in fact, he run no riſk at all (*a*). For wherever a man receives the money of another upon a conſideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honeſty and natural juſtice, to refund it. In ſuch caſe the law implies a debt, *quaſi ex contractu*, and gives the inſured an action againſt the inſurer, for money had and received to his uſe, to recover back the money ſo received (*b*).

It will be our buſineſs in the preſent chapter to ſhew in what caſes, and under what circumſtances, the inſured ſhall be entitled to a return of premium; and how that return ſhall be made.—This may be done under the following heads;

I. *Where the contract is void* ab initio;
II. *Where the riſk has not been commenced;*
III. *Upon the performance of certain ſtipulations;*
IV. *When the deduction of one half* per cent. *ſhall be allowed.*

(*a*) Per Lord *Mansfield*, 3 *Bur.* 1240. Vid. *Pothier*, h. t. n. 180.——(*b*) Vid. 2 *Bur.* 1008; *Doug.* 454; *Cowp.* 668; 1 *Show.* 156. 3 T. R. 266.

Sect. I.

Of Return of Premium where the Contract is void ab initio.

IN general, when the contract is void *ab initio*, it is ſo, either, 1. *For want of intereſt in the inſured*; or, 2. *Becauſe the inſurance is illegal*; or, 3. *For fraud on the one ſide or the other.*—We will enquire in what caſes there ſhall be a return of premium on each of theſe grounds.

1. *Where the Contract is void for Want of Intereſt.*

A want of intereſt may be either *total*, as where the inſured has nothing on board the ſhip; or, *partial*, as where he has an intereſt in the thing inſured, but not to the amount ſtated in the policy. And it may be laid down as a general rule, that if, through miſtake, miſinformation, or any other innocent cauſe, an inſurance, in a ſingle policy, be made without any intereſt whatſoever in the thing inſured, or to a much larger amount than its real value; in the one caſe, the inſurer ſhall return the whole premium; in the other, he ſhall return in the proportion which the true value bears to the ſum inſured. Thus, if a man, ſuppoſing he has goods on board a certain ſhip to the value of 1,000l. inſure to that amount, but afterwards find, either that he has no goods at all on board, or that he has goods only to the amount of half the inſurance; In the one caſe, he would be entitled to a return of the whole premium; in the other to a return of a moiety (*a*). And all the underwriters upon a policy in which the effects are inſured beyond their value, muſt bear any loſs that may happen, and repay a part of the premium, in proportion to their

If an inſurance be made without intereſt, or for more than the real intereſt, there ſhall be a return of premium.

(*a*) Vid. *Le Guidon*, ch. 2, art, 18. Ord. of *Amſt.* art. 22. *Pothier*, h. t. n. 77, 183. *Roccus*, n. 82. *Valin*, ſur. art. 23, p. 67.

reſpective

reſpective ſubſcriptions, without regard to the priority of their dates (*a*).

If there be an over-inſurance by *ſeveral policies*, the underwriters will all be liable to the extent of the value; and to make a return of premium for the reſidue.

If, by *ſeveral policies*, made without fraud, the ſum inſured exceed the value of the effects, theſe ſeveral policies will, in effect, make but one inſurance, and will be good to the extent of the true intereſt of the inſured; and, in caſe of loſs, all the underwriters on the ſeveral policies ſhall pay according to their reſpective ſubſcriptions, without regard to the priority of their dates. And it follows from thence, that all the underwriters on the ſeveral policies would be equally bound to make a return of premium for the ſum inſured above the value of the effects, in proportion to their reſpective ſubſcriptions.—In this particular, our law, as we have already ſhewn (*b*), differs from the ancient law, and indeed from the law of moſt of the other maritime ſtates at this day.

Upon a wager policy the inſured cannot recover back the premium, at leaſt after the riſk is run.

We have already ſeen that a wager policy, at leaſt ſince the ſtat. 19 *G.* II., c. 37, is illegal and void (*c*). Upon ſuch a policy the inſured cannot recover back the premium; at leaſt if he wait till the riſk is over, he ſhall not, after thus taking the chance of a loſs, and of obtaining from the *generoſity*, at leaſt, of the underwriters, the ſum inſured, be permitted to recover back the premium.

Lowry & anr. v. *Bourdieu*, *Doug.* 451.

The plaintiffs had lent one *Lawſon*, captain of the *Lord Holland* Indiaman, 26,000l., for which he gave them a *common bond*. While he was with his ſhip at *China*, the plaintiffs got a policy underwritten by the defendant and others, 'At and from *China* to *London*, beginning the 'adventure *upon the goods*, from the loading thereof on 'board the ſaid ſhip at *Canton*, &c.' and '*upon the ſaid ſhip* 'from her arrival at *Canton*, valued at 26,000l. being the 'amount of Captain *Patrick Lawſon*'s common bond pay-'able to the parties, as ſhall be deſcribed at the back of

An inſurance on an *Eaſt India* ſhip and goods, valued at 26,000l. '*being the a-mount of the captain's bond to the inſured*,' is a wager and void; but the inſured ſhall not, after the riſk is run, have a return of premium.

(*a*) *Habet omnis, aſſecuratio hoc peculiare, ut in ea non ſit prius nec poſterius, quantum ad effectum et validitatem contractus; ſed ultimus aſſecurator tantundem participat in damno et lucro ex aſſecuratione provenienti, quantum prior.* Kuricke *diſſ.* n. 16.——(*b*) Vid. ſup. 146.——(*c*) Vid. ſup, ch. 4. § 2.

'this

'this policy, dated 16th of *December* 1775: And in caſe 'of loſs, no other proof of intereſt to be required than 'the exhibition of the ſaid bond; warranted free from 'average, and without benefit of ſalvage to the inſurers.' —At the head of the ſubſcription was written, "*On a* "*bond as above expreſſed.*"—Captain *Lawſon* ſailed from *China* and arrived ſafe with his adventure in *London*.—The inſured brought an action to recover back the premium, on the ground that the inſurance having been made without intereſt, the policy was void, within the ſtatute (*a*). There was a verdict for the defendant by the direction of Lord *Mansfield*, who tried the cauſe.—Upon a motion for a new trial, the court held that the verdict was right.—Lord *Mansfield* ſaid,—"This is clearly a gaming policy. The nature of the inſurance is known to both parties. The plaintiffs ſay; 'We mean to game; 'but we give our reaſon for it; captain *Lawſon* owes us a 'ſum of money, and we want to be ſecure in caſe he ſhould 'not be in a ſituation to pay us.' It was a hedge. But they had no intereſt; for, if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiff would have been entitled to recover the amount of the bond from *Lawſon*.—This, then, is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not interfere to aſſiſt either party; according to the well-known rule, that, *in pari delicto melior eſt conditio poſſidentis*: Not, that the defendant's right is better than that of the plaintiff; but he muſt draw his remedy from clear fountains.—Mr. Juſtice *Aſhurſt* concurred in this opinion. Mr. J. *Willes* thought this was not a gaming policy; that the money was paid upon a miſtaken idea, and ought to have been refunded.—Mr. Juſtice *Buller* agreed with Lord *Mansfield* and Mr. Juſtice *Aſhurſt*, that this was a gaming policy, being without intereſt: But he held that the reaſon why the plaintiffs could not recover was, that an action brought to reſcind a contract, muſt be brought while the contract continues executory; and then it can only be done on the terms of

Yet, before the riſk is run, and while the contract is executory, the inſured may recover back his premium.

(*a*) 19 G. II. c. 37. ſup. 127.

reſtoring the other party to his original ſituation. He mentioned a caſe of *Walker* v. *Chapman*, in B. R. ſome years before, where a ſum of money had been paid in order to procure a place in the cuſtoms. The place had not been procured, and the party who paid the money, having brought his action to recover it back; it was held that he ſhould recover, becauſe the contract remained executory. "So," ſaid he, "if the plaintiffs in this caſe had brought an action before the riſk was over, they might have recovered; but having waited till the riſk was run, it was then too late (*a*)"

The reader, in peruſing the foregoing caſe, muſt have obſerved that though Mr. Juſtice *Buller* concurs in opinion with Lord *Mansfield*, that the inſured was not, under all the circumſtances of the caſe, entitled to a return of premium, yet he aſſigns a different reaſon for his opinion.—Lord *Mansfield* conſidered the inſurance as an illegal contract, and both parties offenders againſt

---

(*a*) There is a caſe of *Wharton* v. *De la Rive*, (at N. P. after Mich. 1782), mentioned in *Park* 376, where an action is ſaid to have been brought on two wagers, 'one of 26l. 5s. to 100l.; the other of 13l. 2s 6d. to 30l.' that the *American* colonies would be acknowledged as independent ſtates by *France*, ſome time between the firſt of *February* and the firſt of *April* 1778. It is ſtated that, upon the opening of the caſe for the plaintiff, Lord *Mansfield* directed a nonſuit, but it does not appear upon what ground; whether becauſe the wagers were illegal, or becauſe they were in nature of wagering inſurances, and void by the act. It is ſaid, however, that the plaintiff's counſel inſiſted on a verdict for the premium, as if they were in fact inſurances, which Lord *Mansfield* permitted, upon the ground of the contract being void. The caſe of *Lowry* v. *Bourdieu* was then cited by the defendant's counſel, to ſhew that he was entitled to keep the premium. Lord *Mansfield* is made to anſwer, that that caſe did not apply; for there the *riſk had been run*.—But that could not diſtinguiſh it from the caſe before his lordſhip; becauſe, if theſe wagers were to be conſidered as inſurances, the riſk was over on the firſt of *April* 1778, five years before the action was brought. Nay, the action was brought on the ground that the plaintiff had won his wager.

the

the law; and then founds his judgment on the maxim, *in pari delicto melior eſt conditio poſſidentis*; from which it may be inferred that it was his lordſhip's opinion, that, even if the inſured had thought proper to reſcind the contract before the riſk commenced, or, which is the ſame thing, before the event was known, he could not have recovered back the premium.—Mr. Juſtice *Buller* takes a different ground; namely, that though an action might have been maintained to recover back the premium while the contract was *executory*, upon the terms of reſtoring the underwriter to his original ſituation; yet, that, after the riſk is run, it is too late to attempt to reſcind the contract.

In the caſe of *Vandyk* v. *Hewet*, which we ſhall preſently have occaſion to mention more particularly, the court of King's Bench ſeems to have adopted the principle upon which Lord *Mansfield* founded his judgment: It would ſeem, therefore, that Mr. Juſtice *Buller*'s doctrine could apply only to the caſe of an inſurance without intereſt, *innocently* made.

If the contract be void, as being a re-inſurance, there ſhall be no return.

Upon the authority of this caſe it has ſince been determined, that if the contract be void, as being a re-inſurance, within the ſtat. 19 *G.* II., c. 37, § 4, the inſured ſhall not be entitled to a return of premium (*a*).

If the inſurer could ever have been liable, there ſhall be no return.

If, under any circumſtances, the inſurer might, at any time, have been called upon to pay the whole ſum inſured, the premium is earned, and he ſhall not be obliged to return any part of it. Therefore, in the caſe of a valued policy, though the ſum in the policy be twice the value of the effects inſured, there ſhall be no return of premium (*b*).

If captors inſure before condemnation, they ſhall not have a return on its being adjudged no prize;

If the inſured have a contingent inſurable intereſt in the thing inſured at the time when the policy is effected, and the riſk be once begun, there ſhall be no return of premium, though it ſhould eventually turn out that he had no title to the thing inſured. Therefore, though the

(*a*) R. *André* v. *Fletcher*, 3 T. R. 266. Sup. 144.

(*b*) 2 *Magens*, 137.

captors of a ſhip, ſeized as prize, have an inſurable intereſt therein before condemnation; yet, ſhould the ſhip afterwards be adjudged to be no prize, and reſtitution be awarded to the owners, there ſhall be no return of premium, if the riſk was commenced.

Roehm and others v. *Bell*, 8 T. R. 154.

Thus:—Three frigates having taken the ſhip *Weſtcapelle* off the *Cape of Good Hope*, then bound from *Batavia* to *Boſton*, the captors put her under the command of a lieutenant, as prize-maſter, and on the 30th of *January* 1797, wrote to their agents in *England*, mentioning the capture of the *Weſtcapelle*, which they ſuppoſed a lawful prize; and ſtating that, as there was no court of admiralty there, they were under the neceſſity of ſending her to *England* for trial; and then directed an inſurance, for that voyage, to be made on the ſhip and cargo, to the amount of 40,000l. (though the eſtimated value was 150,000l.) which the agents in *England* accordingly cauſed to be effected at a premium of 20 guineas *per cent.* to return 8l. *per cent.* if the ſhip departed from the *Cape* or *St. Helena*, with convoy for *England*, and arrived. The ſhip ſailed from the *Cape* with convoy for *St. Helena*, where ſhe arrived, and ſailed from thence for *England*, without convoy, and arrived in ſafety in the *Thames* on the 7th of *Auguſt* 1797. But the court of admiralty 'declared the ſhip and cargo to 'be *American* property, and decreed them to be reſtored, 'except the part claimed by the chief mate, who was pro-'nounced to be an enemy, and his property on board con-'demned as lawful prize.' The ſhip and cargo, except the part of the chief mate, were reſtored accordingly. After this ſentence, the plaintiffs brought an action againſt the defendant, to recover 18l. 19s. 10d. *per cent.* as a proportion of the premium to be returned in reſpect of the ſhip and ſuch part of the cargo as had been decreed to be reſtored. The defendant inſiſted, 1ſt. That the inſured had an inſurable intereſt to the amount of the ſum inſured, and, in the event of a loſs, might have recovered againſt the inſurers; that the fallacy of the plaintiff's argument aroſe from not diſtinguiſhing between an *inſurable intereſt* and an *abſolute indefeaſible property*; that the inſured had the poſſeſſion of the thing inſured, together with a contingent

contingent intereſt, in the event of its being condemned; beſides, they had an immediate intereſt in the ſubject matter, ariſing out of their reſponſibility for the care and ſafety of the ſhip; for in caſe of groſs negligence or miſconduct, the court of admiralty would adjudge a compenſation to the owners in damages; and if, in any event, the inſurers might have been anſwerable, there could be no return of premium. 2dly, That this being a valued policy, made *bonâ fide*, without any intention of fraud, and the inſured having an indiſputable intereſt, the extent of the intereſt was immaterial. 3dly, That as this was an inſurance on foreign ſhips, it was not neceſſary that the inſured ſhould have any intereſt at all, it not being within the ſtat. 19 *G.* II., c. 37.—The court were clearly of opinion that the inſured had an inſurable intereſt, and that the riſk having been run, there could be no return of premium.—Lord *Kenyon* ſaid,—" I will not enter into a diſcuſſion of either of the two laſt points, becauſe the firſt alone furniſhes, in my opinion, an anſwer to this action. —The real queſtion in this caſe is one of the moſt ſimple that can be ſtated. It is merely this, whether the inſured had or had not *any intereſt*. The captors had the poſſeſſion of the property inſured, and from that poſſeſſion certain rights and duties reſulted. If it were a legal capture, the captors were entitled; if not, they were liable to be called to an account in the court of admiralty, where they might be amerced in damages and coſts. It was important, therefore, to them to take care that there ſhould be ſomething forthcoming to anſwer for the amount of theſe damages."

2. *Where the Inſurance is upon an illegal Trading.*

It has already been ſhewn (*a*) that no *Britiſh* ſubject can legally carry on any commerce with the enemies of the ſtate, without the King's licence; and that an inſurance made to protect ſuch commerce is void; and it has

Though an inſurance to protect a trading with the enemy void, there ſt be no return premium.

(*a*) Sup. ch. 3. § 4.

been determined that the insured, in such case, cannot recover back his premium: And though this was after a loss had happened, it was after the insurers had availed themselves of the illegality of the contract to avoid paying the loss, and it was founded upon the same principle upon which Lord *Mansfield* supported his judgment in the case of *Lowry* v. *Bourdieu* (*a*), which would have maintained the decision in that case, even if the action had been brought while the contract was executory.

Van Lyk & others v. Hewit, 1 *East* 96.

Thus:—Goods were insured, 'At and from *London* 'to *Embden* or *Amsterdam*, at a premium of ten guineas 'per cent., to return five upon their arrival at their place 'of destination.'—In an action on this policy for a loss by capture, it was averred in the declaration that the insurance was made for the benefit of certain persons therein named.—Upon the trial it appeared that the goods were shipped on board a *Prussian* neutral vessel, on account, partly of the plaintiffs who were naturalized foreigners resident in *London*, and partly of certain other persons, aliens, then resident in *Holland*. It appearing that the insurance was intended to cover a trading with *Holland*, then at war with this kingdom, the idea of recovering the loss was given up on the authority of the case of *Potts* v. *Bell* (*b*).—The plaintiffs then contended that they were entitled to recover back the premium, on the ground that the policy never attached, and the risk had therefore never commenced. And it was compared to the case of *Lacaussade* v. *White* (*c*), in which it was determined that a person who has deposited money upon an illegal wager may recover it back, even after the event is determined against him.—But the court were clearly of opinion, that the plaintiffs had no right to recover back the premium.—Lord *Kenyon* said;—"There is no distinguishing this case, on prin-

(*a*) Sup. 640 ——(*b*) 8 T. R. 548, sup. 87.——(*c*) 7 T. R. 535 -- But Vid. 8 T. R. 575, where it was held that if the money deposited upon an illegal wager be paid over to the winner, it cannot be recovered back.

ciple,

ciple; from the common caſe of a ſmuggling tranſaction. Where the vendor aſſiſts the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themſelves or the value of them (*a*). Both parties are in *pari delicto*, and *potior eſt conditio poſſidentis.*"

It has alſo been ſhewn (*b*), that no inſurance can be legally made on an illegal trading with the *Britiſh* colonies. — And it is clearly binding upon all *Britiſh* ſubjects, who are not permitted to plead ignorance of *Britiſh* laws: In the following caſe, it was made a queſtion, whether this rule was applicable to the caſe of foreigners, who cannot be preſumed to poſſeſs a knowledge of our laws, and determined in the affirmative.

A policy was effected upon goods warranted *Daniſh* property, on board a *Daniſh* ſhip, 'At and from *Bengal*,' (in which were ſeveral *Daniſh* as well as *Britiſh* ſettlements) 'to *Copenhagen*, with liberty to touch, ſtay, and 'trade at all ports and places, &c.'—The goods inſured were loaded at *Calcutta*, and the ſhip and cargo, in the voyage to *Copenhagen*, were captured by the *French*.—In an action to recover for this loſs, it was objected that, by the navigation act, 12 *C.* II. c. 18. § 1, (*c*), it was unlawful to export goods from any *Britiſh* colony, in any veſſel not belonging to a *Britiſh* ſubject. This objection prevailing, it was then inſiſted that if the exportation was illegal, the riſk never commenced, and that the plaintiffs were therefore entitled to a return of premium; and it was urged that if, in any caſe, the court would preſume a party to have been ignorant of the law, they might well do ſo in this, ſince, previous to the ſhipment in queſtion, a practice had prevailed of allowing ſhips belonging to ſtates in amity with *Great Britain*, to export goods from our ſettlements in *India*; in ſo much, that the ſtat. 37 *G.* III. c. 117, which paſſed only four months after this cargo was ſhipped, removed, under certain reſtrictions, the

Morck & anr. v. Abel, 3 *Bſ. & Pul* 35.

The inſured in a policy upon an illegal trading with the *Britiſh* colonies is not entitled to a return of premium though he be a foreigner, and not preſumed to be acquainted with our laws.

(*a*) Vid. *Biggs* v. *Lawrence*, 3 T. R. 454. *Clugas* v. *Penaluna*, 4 T. R. 466. *Waymell* v. *Reed*, 5 T. R. 599.——(*b*) Ch. 3. § 2.—(*c*) Sup. 63.

prohibition impoſed by the ſtat. 12 *C.* II.—But the court determined that the plaintiffs were not entitled to a return of premium.—They held, that no man, in a *Britiſh* court of juſtice, can ſeek the aſſiſtance of the law, who founds his claim upon a contravention of the *Britiſh* laws; that the plaintiffs being foreigners did not take them out of the general rule applicable to illegal contracts; and that there was very little room to preſume ignorance of a law peculiarly applicable to the ſubjects of foreign ſtates.

Lubbock v. Potts, 7 *Eq.* 449.

S. P.

So, where an inſurance upon colonial produce, from *Trinidad* to *Gibraltar*, was holden to be illegal, as being againſt the navigation acts, it was determined that the inſured was not entitled to a return of premium, though he did not appear to have been aware that the voyage was illegal.

3. *When there is Fraud on the one Side or the other.*

If the policy be void for fraud on the part of the inſurer, the premium ſhall be returned.

When the policy is void on account of fraud committed by the inſurer, there can be no doubt but that an action will lie to recover back the premium. As if an inſurance be made on a certain voyage, loſt or not loſt, when the inſurer, at the time he enters into the contract, privately knows that the ſhip is arrived ſafe; he will be bound to reſtore the premium (*a*).

Whether this be ſo, where fraud has been committed by the inſured.

But, whether the inſurer be bound to return the premium, in a caſe where fraud has been committed by the inſured, is a queſtion upon which more doubt might be entertained.—On the one hand, it might be contended that as the underwriter receives the premium in conſideration of his taking upon himſelf the riſk mentioned in the policy, he can have no right to retain it, if no riſk was ever run; and, however improperly or unfairly the inſured may have conducted himſelf, that will not furniſh a new conſideration to the underwriter, to be ſubſtituted in the place of that which was expreſſed in the policy, ſo as to enable him to retain the premium.

(*a*) Per Lord *Mansfield*, in *Carter v. Boehm*, 3 *Bur.* 1909, ſup. 465, 6.

On the other hand, it might be deemed a ſort of ſoleciſm in our law, if the inſured could, by paying a premium, take the chance of reaping the propoſed advantage from a fraudulent inſurance; and yet, when detected, be entitled to recover back his premium, and ſo ſuffer no loſs. It has been ſaid, indeed, that the idea of enriching one man by the puniſhment of another is a ſtrange one, and ſomewhat inconſiſtent with the preſent notions of criminal juſtice (*a*).—But this idea is not ſtrange in our law; for it pervades all our ſtatutes in which penalties are given to common informers. It is true that the legiſlature gives theſe penalties, not for the ſake of enriching the informers, but to tempt them, by the hopes of enriching themſelves, to bring offenders to juſtice. When a penalty is given to the party grieved, it is given for the expreſs purpoſe of enriching him by the puniſhment of the wrongdoer. Upon the ſame principle, a ſecurity given to a lender upon an uſurious contract is declared void by the ſtat. 12 *Ann.* c. 16, § 1.; and yet the borrower, who is a party to the illegal contract, ſhall never be obliged to repay it. Nor is this principle confined to the ſtatute law; for, by the common law, the vendor of ſmuggled goods ſhall not be allowed to recover the price of them from the vendee, though he be far from innocent of the fraud againſt the revenue (*b*). Many other inſtances might be adduced from the common law to ſhew that one party ſhall be permitted to enrich himſelf by the puniſhment of another, even where they are both *in pari delicto* (*c*). And it would ſeem from the opinion of Lord *Mansfield* in *Lowry* v. *Bourdieu* (*d*), and that of Lord *Kenyon* in *Vandyk* v. *Hewit* (*e*), that, in the caſe of a gaming policy, the inſured cannot recover back his premium, even where the riſk has never been commenced: How much ſtronger, then, in point of juſtice, is the claim of an innocent underwriter, to retain the premium of an inſurance, by which the inſured meant

(*a*) *Park* 215.——(*b*) Vid. 3 T. R. 454; 4 T. R. 466; 5 T. R. 599.——(*c*) Vid. 3 T. R. 454, *Cowp.* 343.——(*d*) Sup. 640.——(*e*) Sup. 646.

to

to defraud him; and which is ſome ſatisfaction for the riſk he has run, though not an adequate puniſhment of the inſured, for his meditated fraud.

It has been determined that there ſhall be a return, if the contract be void for the fraud of the inſured.

But reaſonable and juſt as this idea may ſeem, it has not always prevailed. The court of chancery, in two inſtances, ordered a return of premium where the policies were declared void for fraud committed by the inſured.

Wittingham v. *Thornburgh*, 2 *Vern.* 206. Pr. in ch. 20.

The firſt of theſe caſes was an inſurance on the life of one *Horwell*, for a year, intereſt or no intereſt. The inſured, in order to draw in ſubſcribers, agreed with one *Marwood*, a neighbour of *Horwell*'s, an eminent merchant who was a leading man in ſuch caſes, to ſubſcribe firſt; but he was to loſe nothing, in caſe *Horwell* died within the year, but, on the contrary, was to ſhare what ſhould be gained from the other ſubſcriptions. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others, (who had enquired of him about *Horwell*), ſubſcribed likewiſe. *Horwell* lived but four months. A bill was brought to be relieved againſt the policy; and it appearing that the inſured had no intereſt in the life of *Horwell*, who was in a languiſhing condition at the time the inſurance was effected, the court decreed the policy to be delivered up to be cancelled; but the premium was to be *repaid*, the plaintiffs deducting their coſts thereout.

De Coſta v. *Scandaret*, 2 P.W. 170. ſup. 351. S. P.

The other caſe was an inſurance on a ſhip, where the inſured was guilty of a fraudulent concealment, for which the court of chancery ordered the policy to be delivered up to be cancelled; but, in like manner, directed the premium to be *paid back*, and allowed out of the coſts.

Wilſon v. *Dycket*, 3 *Bur.* 1361.

The ſame doctrine adopted in a court of law.

This rule of the court of chancery, was firſt adopted at law, upon the authority of the above two caſes, in an action brought on a policy of inſurance on a ſhip, with a count for money had and received by the defendant to the plaintiff's uſe.—The cauſe was tried under a decree of the court of Chancery, where the inſured, (being then plaintiff), offered to pay back the premium which was 10l.; but no money was paid into court *in this action*.—There was a verdict for the plaintiff for the

10l.

101. premium, on the count for money had and received, although the jury found the policy to have been *fraudulent*. In fact, in this, as in the foregoing case of *Wittingham* v. *Thornburgh*, the first underwriter was only a decoy-duck to mislead others, and was not himself to be bound by the policy.—But it was agreed to bring before the court this question,—"Whether, upon a policy being found *fraudulent*, the premium should be returned."—In support of the affirmative, the two last mentioned cases were cited on the part of the insured. On the other side was mentioned a case of *Rucker* v. *Hollingbury* before the Master of the Rolls, who held an opinion contrary to those cases.—But Lord *Mansfield* said there must have been some mistake in the statement of this case; for the practice of the court of Chancery was certainly agreeable to the former cases: He then enquired whether there was any common law determination to the same effect, and it not appearing that there was, he said it was plain what must be done in this case: For he looked upon the *offer* made by the underwriter's bill in equity to be the same thing as if the money had been *actually* brought into court in the present cause: Therefore the verdict for the plaintiff was set aside, and a verdict entered for the defendant.

It has been said, however, of this case, "that a trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered the offer in the same light as if he had paid the money into court, and therefore the question *remained undecided* (*a*). But, from the mode of disposing of this case, it is plain that, if the underwriter had not done what was deemed equivalent to bringing the money into court, there would have been a verdict against him for the premium. The court, therefore, clearly decided that the insured was entitled to a return of premium. And this decision had the more weight as it may be fairly concluded, from the

(*a*) *Park* in index tit. *Return of Premium.*

gross

groſs miſconduct of the inſured, and from the expedient adopted by the court to ouſt him of the coſts at law, that this point was decided in his favour with much reluctance.

But the courts now hold a contrary doctrine.

But, be that as it may, Lord *Mansfield*, upon better reflection, ſaw at length, the impolicy, not to ſay injuſtice, of permitting the inſured to take his chance of defrauding the underwriters, without the riſk of loſing his premium.—Therefore, where an action was brought on a policy for a total loſs, and it appeared to the ſatisfaction of the jury, that the plaintiff had given the order to his broker to get the inſurance effected, after he had received information of the loſs of the ſhip, the jury found a verdict for the defendant; and Lord *Mansfield*, who tried the cauſe, ſaid the fraud was ſo groſs, that the plaintiff ought not to recover the premium from the underwriters.

Tyler v. *Horn*, at N. P. after Hil. 1785, *Park*, 418.

The fraud was certainly very groſs in this caſe, but not more groſs than in each of the three foregoing caſes, which we have cited.

Chapman and others, aſſignees of *Kennet* v. *Fraſer*, B.R. Tr. 33 G. III.

But this important queſtion has been ſince finally ſettled in a caſe which came before the court of King's Bench, and where the fraud had been committed, not by the inſured himſelf, but by his agent; and the whole court were of opinion that, in all caſes of *actual fraud*, on the part of the inſured, committed either by himſelf or his agent, the underwriter ſhall retain the premium.

Sect. II.

Where the Riſk has not been commenced.

Foreign authors deny that the inſured can diſſolve the contract, and demand a return of premium.

All the foreign authors agree that inſurance is a conditional contract, that the riſk is of the eſſence of it, and that the premium is the price of the riſk to be run: And yet, many of them hold that the inſured is not permitted to diſſolve the contract by his own act; and therefore if he relinquiſh the intended voyage, the inſurer is not

not bound to return the premium, and that he has a right to demand it, if it has not been already paid (*a*).—They except only the caſe where it becomes impoſſible for the inſured to ſhip the goods, or to cauſe the ſhip to proceed on her voyage (*b*).

In *Holland* and *France*, the law is different.

But the rules which prevail in *Holland* and *France* are more conformable to the nature of the contract of inſurance. In *Holland*, if the goods inſured ſhould not be ſhipped, or ſhould appear to be of leſs value than the ſum inſured, the inſured may, in the one caſe, demand a return of the whole premium, in the other, a return for what is over-inſured (*c*).—In *France*, if a ſtop be put to the voyage before the ſhip ſails, *even by the act of the inſured*,

(*a*) *An aſſecurator teneatur reſtituere pretium, eò quod in navi non fuerunt merces? Videbatur teneri aſſecurator ad reſtitutionem pretii recepti ob cauſam illius periculi; tamen in contrarium eſt veritas, quòd non ſolum non teneatur pretium reſtituere, imo poſſit petere illud; et ratio eſt, quia licet emptio periculi non teneat in præjudicium promiſſoris, tamen in ejus favorem, et in præjudicium, aſſecurati falſa aſſertio bene tenet. Sic etiam quia illa cauſa ceſſat, facto domini mercium, eò quod nullas merces miſit in navem, et non facto aſſecuratoris, per quem non ſtetit.* Roccus, *h. t. not.* 11, 13, 14, 82, 88; *vid.* Santerna, *part.* 3. *n.* 19, 20, 22; Straccha *gl.* 6. Caſaregis, *diſc.* 1, *n.* 53, 58.——(*b*) *In caſibus in quibus impeditur navigatio, putâ ſi navis ſit combuſta in portu, vel deſtructa, vel rex eam capiat pro neceſſitatibus publicis, et impeditur conditio aſſecurationis: quia tunc non poſſet imputari conditionis defectus magis uni, quam alteri parti, nullus tenebitur; et pretium periculi non poteſt peti, et ſolutum repetitur, quaſi cauſâ non ſecutâ.* Roccus, *h. t, not.* 15, 56.—*Si, ex aliquo impedimento, aſſecuratus non potuiſſet merces ſuas onerare, tunc contractus aſſecurationis locum non haberet, ita ut ſi pretium aſſecurationis fuiſſet ſolutum, repeti certo poterit per aſſecuratum.* Caſaregis *diſc.* 1, *n.* 182, *diſc.* 62, *n.* 4. Vid. *Le Guidon.* ch. 9. art. 16, which is nearly to the ſame effect. Vid. Ord. of *Antwerp*, art. 16. 2 *Magens* 27. *Locennius*, lib. 2, ch. 5, n. 16.——(*c*) Ord. of *Amſterdam*, art. 23, 2 *Mag.* 136.

the insurance becomes void, and the insurer shall return the premium (*a*).

In *England*, if the risk be not begun, to whatever cause this be owing, the premium shall be returned.

In *England*, the rule is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will of the insured, or to any other cause, except *fraud*, the premium shall be returned. The reason is, that a policy of insurance is a contract of indemnity; the underwriter receives the premium for running the risk of indemnifying the insured; and therefore, if he run no risk, to whatever cause, except fraud, this may be imputable, the consideration for which the premium was paid to him fails, and he ought to return it (*b*).

Where the policy is void, and there is no fraud imputable to the plaintiff, he is entitled to a return of premium.

If the contract be void, on account of a non-compliance with any warranty, express or implied; as if the ship do not sail on the day prescribed, or do not depart with convoy, or be not sea-worthy, and there be no fraud imputable to the insured, he shall be entitled to a return of premium; because the contract never attached, and the risk, therefore, never commenced. In such case, it is always advisable for the defendant, in an action on the policy, to bring the premium into court; otherwise the insured will have the advantage of trying the question on the validity of the contract, without the peril of costs; for, at the worst, he will be sure of a verdict for the premium (*c*). And it is not unusual when the jury have brought in their verdict for the defendant, on the only question submitted to them, for the plaintiff's counsel to claim a verdict for the premium, upon the count for money had and received.

When the plaintiff is entitled to a return of premium, he may claim a verdict for it, even after the jury have delivered their verdict for the defendant, on the principal question.

Indeed it has been the constant practice, for the plaintiff's counsel to abstain from any mention of the premium, where he means to claim a loss; because, by setting up a demand for the premium, he confesses a *doubt*, at least, of his being able to sustain his principal claim; and throwing out such a doubt, in a case already, perhaps,

(*a*) Ord. of *Louis* XIV. h. t. art. 37. Vid. *Emerig.* tom. 2, p. 154. *Pothier*, h. t. n. 178, 179. —— (*b*) Per Lord *Mansfield*, in *Tyrie* v. *Fletcher*, *Cowp.* 668. —— (*c*) Vid. inf. ch. 16. § 4.

doubtful,

doubtful, may raiſe a prejudice very injurious to his client's intereſt. And it may be ſaid, moreover, in favour of this practice, that the defendant may come prepared to diſpute the plaintiff's claim to a return of premium, and may prove fraud, which will not be inconſiſtent with any other defence he may have to make; whereas it often happens that the plaintiff's claim to a return of premium reſts on the very caſe made by the the defendant (*a*).

But the court will not, on ſetting aſide a verdict for a loſs, ſubſtitute a verdict for the premium.

If the queſtion of return of premium be not agitated at the trial, and a verdict be taken for the plaintiff for the loſs, ſubject to the opinion of the court upon any point that may be reſerved, and that point be decided againſt the plaintiff; it will then be too late to ſet up his claim to a verdict for the premium; for the court cannot find a new verdict, or ſubſtitute any other ſum in lieu of that which the jury gave in damages (*b*).

Where the voyage and premium are diviſible, and any part not begun, the premium for that part ſhall be returned.

If the inſurance be upon a voyage which is diviſible into ſeveral diſtinct riſks, which are, in effect, ſeveral diſtinct voyages, the premium may be apportioned according to theſe ſeveral riſks; and in caſe one or more of thoſe riſks ſhould not have been commenced, the proportion of premium applicable to thoſe parts ſhall be returned.

Stephenſon v. *Snow*, 3 *Bur.* 1237.

Thus:—A ſhip was inſured, 'At five guineas *per* 'cent. loſt or not loſt, at and from *London* to *Halifax*, 'warranted to depart with convoy from *Portſmouth* for 'the voyage.'—Before the ſhip arrived at *Portſmouth*, the convoy was gone. Notice of this was immediately given to the underwriters, who were deſired, either to make the long inſurance, or return part of the premium. They refuſed, and the inſured brought an action to recover a part of the premium. At the trial, a caſe was reſerved for the opinion of the court, ſtating the above facts, and alſo ſtating, that the jury found that the uſual and ſet-

A ſhip is inſured at and from *London* to *Halifax*, warranted to depart with convoy from *Portſmouth*, at five guineas *per cent.* On her arrival at *Portſmouth*, ſhe finds the convoy gone. Notice of this is immediately given to the inſurers—The premium ſhall be apportioned.

(*a*) Vid. *Penſon* v. *Lee*, 2 *Boſ.* & *Pul.* 330, in which this queſtion was very much debated. —— (*b*) R. *Neſbit* v. *Whitmore*, 1 *Eaſt* 97; n.

tled

tled premium from *London* to *Portſmouth* was one and a half *per cent.* which the plaintiff offered to allow the defendant to retain; and that it was uſual for the underwriters, in ſuch caſes, to return part of the premium: But the *quantum* was uncertain, and muſt in its nature be ſo; becauſe it depended upon uncertain circumſtances.—Upon this caſe, the court were unanimouſly of opinion that the plaintiff was entitled to recover.—Lord *Mansfield* ſaid,—"Theſe contracts are to be taken with great latitude: The ſtrict letter is not ſo much to be regarded as the object and intention of the parties. Equity implies a condition that the inſurer ſhall not receive the price of running a riſk, if he run none. The premium is without conſideration, as to the voyage from *Portſmouth* to *Halifax*; and then this caſe is within the general principle of actions for money had and received. I do not go upon the uſage, which is only that, in like caſes, a *part* of the premium is returned, without aſcertaining *what* part. If the riſk be not run, though it be by the neglect, or even the *fault*, of the inſured, yet the inſurer ſhall not retain the premium. It has been objected that the voyage being begun, and part of the riſk already run, the premium cannot be apportioned: But I can ſee no force in this. This is not a contract ſo entire that there can be no apportionment: For there are two parts in it, and the premium may be divided into two diſtinct parts relative, as it were, to two diſtinct voyages. The practice ſhews that it has been uſual, in ſuch caſes, to return a part of the premium, though the *quantum* be not aſcertained: And, indeed, the quantum muſt vary as circumſtances vary. But though the *quantum* has not been aſcertained; yet the principle is agreeable to the general ſenſe of mankind."—Mr. Juſtice *Deniſon*, and Mr. Juſtice *Foſter*, concurred in this opinion.—Mr. Juſtice *Wilmot* ſaid,—"The uſage to return a part of the premium, in ſuch caſes, is a ſtrong proof of the equity of the thing; and nothing can be more juſt and reaſonable. If the riſk be once begun, the inſured ſhall not deviate or return back, and then ſay, I will go no further under this contract, but will have my premium returned. Upon this policy, there are two diſtinct points of time, in effect two voyages,

ages, which were clearly in the contemplation of the parties; and only one of the two voyages was made, the other was not at all entered upon, nor was the riſk ever begun (*a*)."

In the following caſe, though the facts did not enable the court to pronounce any definitive judgment upon this point; yet, in ſending it back to a new trial, an opinion was delivered which tends to ſtrengthen the authority of the above deciſion.

Rothwell v. Cooke, 1 *Boſ. & Pul.* 172.

A ſhip is inſured from *Hull* to *Bilboa*, warranted to depart from *England* with convoy. The voyages from *Hull* to *Portſmouth*, the place of rendezvous, and from thence to *Bilboa*, may be conſidered as diſtinct; and in caſe the ſhip ſails without convoy, and is taken, the premium may be apportioned, and a part returned.

An inſurance was made on the ſhip *Manning*, 'At 'and from *Hull* to *Bilbōa*, warranted to depart from *Eng-* '*land* with convoy.'—The ſhip ſailed from *Hull* to *Portſmouth*, and from thence departed with convoy; but this not being direct for *Bilboa*, ſhe left it, and was afterwards captured.—In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonſuited; but his counſel inſiſted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and no money paid into court, a verdict was given for the plaintiff for the whole premium.—Upon a motion to ſet aſide this verdict and enter a nonſuit, it was contended on the part of the defendant that, as the riſk had commenced, the plaintiff could not be entitled to any return of premium.—On the part of the plaintiff, it was inſiſted that there were two diſtinct voyages in this caſe; the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of diſcharge; that the riſks were of different natures, one being without, the other with, convoy; and that, as the latter was never begun, the plaintiff muſt at all events be entitled to a return of a proportion of the premium on that account.—

(*a*) Vid. Lord *Mansfield*'s obſervations on this caſe, (*Cowp.* 669, inf. 655), in which he labours to vindicate the deciſion of it, by ſhewing that the grounds of it were, that the voyage was in fact *two voyages*, and that the contract compriſed *two diſtinct conditions*. Vid. alſo the obſervations on this and the other caſes on this point. 1 *Boſ. & Pul.* 174.

The court directed the verdict to be set aside, and granted a new trial, being of opinion that if the underwriters were not entitled to retain the whole premium, yet, having ran the risk from *Hull* to *Portsmouth*, they were at least entitled to retain a proportion of it, if, upon a further investigation, it should turn out that the voyage was divisible, and that the premium in such cases had ever been apportioned (*a*).

Yet, upon an insurance "*at and from*" a place, the risk is not divisible.

Yet, where an insurance is made on a ship, '*At and from*' her port of departure, and warranted to sail on or before a given day, and the ship does not sail within the time required by the warranty, by which the insurer is discharged; it has been holden that the risk at and from the port of departure is entire, and not divisible into two distinct risks, and that, therefore, the premium cannot be apportioned, so as to entitle the insured to any return.

Meyer v Gregson, B. R. *East* 24 *G.* III. MS.

A ship is insured "*at and from Jamaica* to *Liverpool*, warranted to sail on or before the first of *August*; premium 20 guineas *per cent.* to return 8 guineas if she sailed with convoy." She did not sail till *September*:—The insured shall only be entitled to 8 guineas *per cent.* for convoy, and not to an apportionment of the rest of the premium.

Thus:—A ship was insured 'At and from *Jamaica* to '*Liverpool*, warranted to sail on or before the first of '*August*; premium 20 guineas *per cent.* to return 8, *if* '*she sailed with convoy.*'—The ship did not sail till *Septem*-'*ber*, and was lost in the voyage.'—The warranty, as to the time of sailing, not being complied with, the underwriters were discharged from the risk after the first of *August*, and an action was brought by the insured for a return of premium.—The defendant, who was an underwriter for 100l., paid 8 guineas into court, being the sum to be returned, if the ship sailed with convoy.—The jury apportioned the premium, and gave 8 guineas more for the risk from *Jamaica* to *Liverpool*; which they considered as not having been commenced; thus allowing 4 guineas for the risk "*at Jamaica.*"—The defendant moved to set aside the verdict, and enter a nonsuit, upon the ground that he risk was entire, the premium entire, and the voyage indivisible.—Lord *Mansfield*, Mr. Justice *Ashurst*, and Mr. Justice *Buller*, (against the opinion of Mr. Justice *Willes*, who thought with the jury, that the premium should be apportioned), determined

(*a*) This, upon memory, seems to be the result of what was done by the court, though not fully expressed in the printed report.

that

that the inſured was not entitled to recover more than had been paid into court.—Lord *Mansfield* ſaid,—"It would be endleſs to go into an enquiry about the value of the riſk "*at Jamaica*;" which is different at different ſides of the iſland: The parties divided the riſk, as to convoy; for 8 guineas were to be returned if the ſhip ſailed with convoy. Independent of that, it was an inſurance "At and from *Jamaica* to *London*," at 12 guineas *per cent.* with an abſolute warranty to ſail "on or before the 1ſt of *Auguſt*," and nothing is ſaid from whence it can be inferred that it was meant that there ſhould be two riſks, or by which the riſk at *Jamaica* could be diſtinctly eſtimated (*a*)."—Mr. Juſtice *Buller* ſaid,—"As the parties have not conſidered it as two riſks, nor eſtimated the riſk "*at Jamaica*," neither the court or jury have any right to do it for them. In all the inſurances from *Jamaica*, the policy runs "*at and from*;" and though in many inſtances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned; and no uſage to do ſo has been found by the jury."

Upon an inſurance *at and from* a place, an uſage ſhould be proved to warrant a diviſion of the riſk.

In a ſubſequent term the following caſe came before the ſame court; and though the point was not decided by the judges, yet Lord *Mansfield*, in directing a new trial, laid down the principle, which he conceived ought to govern theſe caſes, in terms which ſeem more reconcileable to the caſe of *Stevenſon* v. *Snow* (*b*) than to the laſt cited caſe of *Meyer* v. *Gregſon*.

A ſhip was inſured 'At and from any port or ports 'in *Jamaica* to *London*, following and commencing from

Gal v. *Mackill*, B. R. *Laſt.* 25 *G.* III.

A ſhip inſured at and from *Jamaica* to *London*, warranted to ſail with convoy, arrives too late at the place of rendezvous for the convoy, but follows and overtakes them:—Whether there ſhall be a return of premium.

(*a*) Lord *Mansfield*, in delivering his opinion in the caſe of *Tyrie* v. *Fletcher*, *Cowp.* 670, inf. 662. ſeems to have entertained a different ſentiment on this point. He then inclined to think that if the words of the policy were "*at and from*, provided the ſhip ſhall ſail on or before the 1ſt of *Auguſt*," it would fall within the reaſoning of *Stevenſon* v. *Snow*, and that there would then be two parts, or contracts, of inſurance, with diſtinct conditions. But this can only be conſidered as an extra-judicial opinion expreſſed very doubtfully.—(*b*) Sup. 655.

'her first arrival there; warranted to sail with convoy 'for the voyage, from the place of rendezvous.'—The ship did not get to the place of rendezvous in time to sail with the convoy,—but sailed after, and overtook them; so that the warranty was not complied with, and the underwriters were discharged from the time of the ship's sailing.—The insured brought an action to recover back a part of the premium for the voyage *from Jamaica*.—At the trial, an usage seemed to have been proved, that when the ship was not out of the port of *Jamaica*, the allowance was one-half *per cent.* In other cases it was arbitrary, and two or three *per cent.* was reasonable. There was a verdict for the plaintiff. Upon a motion for a new trial, the counsel differed as to the facts that were in evidence, and the cause was sent back to a new trial, without the question of law having been much discussed.—Lord *Mansfield*, however, said, that where there is a *contingency* in the voyage, the risk may be divided. That the reason why there are not two polices in such cases was, that the risk "*at*," is capable of exact computation. He said the former cases upon this point were contradictory.

Where there is a contingency in the voyage, the risk may be divided.

In the same term the following case was determined: And though the judges seem to have laid great stress on the *usage* found by the jury, to return the premium, deducting one half *per cent.* upon insurances, at and from *Jamaica*, with a warranty to depart with convoy, or to sail on or before a given day, and the warranty is not complied with; and though it is distinguished from the case of *Meyer* v. *Gregson* on this ground; yet it cannot be denied that the authority of that case is greatly shaken by it.

Long v. *Allen*, B. R. *East* 25 *G.* III MS.

That was the case of an insurance on goods, 'At and 'from *Jamaica* to *London*, warranted to depart with con- 'voy, for the voyage, and to sail on or before the first 'of *August*, at a premium of 12 guineas *per cent.*'—The ship sailed from *Jamaica* to *London* on the 31st of *July*, but without any convoy, whereby the underwriters became discharged from the remaining risk.—An action was brought for a return of premium.—The jury found a verdict

Goods are insured "At and from *Jamaica* to *London*, warranted to depart with convoy before the 1st of *August*." The ship sails before the

a verdict for the plaintiff ſubject to the opinion of the court on the above facts; in addition to which, they found 'that it was the conſtant and invariable uſage in 'inſurances, at and from *Jamaica* to *London*, *warranted* 'to depart with convoy, or, to ſail on or before a certain day, to 'return the premium, deducting one half *per cent.* if the 'ſhip ſailed without convoy, or after the day preſcribed.' —Upon this caſe, the court determined that the plaintiff was entitled to recover according to the uſage proved.— Lord *Mansfield* ſaid,—"The law is clear, that if the riſk be commenced, there ſhall be no return of premium. Hence queſtions ariſe of *diſtinct* riſks, inſured by one policy. My opinion has been to divide the riſks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned againſt them. But where an expreſs uſage is found by the jury, the difficulty is cured."—Mr. Juſtice *Buller* ſaid;—"The counſel for the defendant did right to make the chief queſtion, whether any evidence of this uſage ought to have been received. In mercantile caſes, from Lord *Holt*'s time, and in policies of inſurance in particular, a great latitude of conſtruction, as to uſage, has been admitted. By uſage, places come within the policy, which are not within the words: Uſage explains, and even controuls the policy. The uſage here found by the jury is univerſal; and though, in ſome caſes, one half *per cent.* is a ſmall premium for the riſk *at*; yet the underwriters are aware that it is ſo, and no inconvenience can reſult from it. In *Meyer* v. *Gregſon*, no uſage was found."

day, but without convoy. There is an *uſage*, that in ſuch caſes the premium ſhall be returned, deducting ½ *per cent.* for the riſk *at*.—The inſured ſhall recover the reſidue of his premium.

But if the riſk be entire, and be once commenced, it is a general rule that there ſhall be no return of premium. And the ſhortneſs of the time when the thing inſured was put in riſk affords no ground for a return of any part of the premium; for it becomes the abſolute property of the inſurer, the moment the riſk commences, though it ſhould ceaſe the moment after. This is one of the favourable circumſtances which compenſate the inſuer for the accidents to which he is expoſed. It is impoſſible to apportion the premium to the duration of the riſk, which

But if the riſk be entire and be once commenced, there ſhall be no return.

may be greater in the firſt hour than in the reſt of the voyage (*a*). Therefore if the ſhip get under weigh, and ſail on the voyage inſured, the premium is acquired, though ſhe return the ſame inſtant and wholly abandon the voyage. So if the ſhip deviate from the voyage inſured the next hour after ſhe ſails; though this diſcharges the inſurers, yet, the riſk having been commenced, there ſhall be no apportionment, or return of any part of the premium, in reſpect of the diminution of the riſk.—Though the voyage be to ſeveral different places, and conſiſt of ſeveral diſtinct parts; yet, if in fact it be *one entire riſk*, for *one entire premium*, and not ſeveral diſtinct riſks, there ſhall be no apportionment, or return of the premium, on account of any contingency which puts an end to the contract, before the commencement of any part of the voyage inſured (*b*).

Bermon v. *Woodbridge* *Doug.* 751.

A ſhip is inſured "At and from *A.* to *B.* during her ſtay at *B.* and from thence to her port of diſcharge at *C.* and at and from *C.* back to *A.*" The ſhip is taken before ſhe arrives at *C*:—There ſhall be no return of premium for the voyage from *C.* to *A.* this being one entire riſk and one voyage.

Thus:—An inſurance was made on a *French* ſhip and her cargo, 'At and from *Honfleur* to the coaſt of *Angola*, 'during her ſtay and trade there; at and from thence 'to her port or ports of diſcharge in *St. Domingo*; and at 'and from *St. Domingo* back to *Honfleur*; *at a premium* '*of eleven per cent.*'—The ſhip ſailed to *Angola*, and from thence, after ſtaying ſome time there, to the *Weſt Indies*. On her way from *Angola*, ſhe put into *Cayenne*, on the coaſt of *America*, and from thence went to *Martinico*, confeſſedly out of her courſe to *St. Domingo*, where the captain was obliged to diſpoſe of his cargo. The ſhip ſailed for *Honfleur*; but was taken by a privateer on her voyage thither.—As the deviation diſcharged the underwriters, the only queſtion was, whether there ſhould be a return of part of the premium.—On the part of the plaintiff it was contended, that the voyage inſured con-

(*a*) Vid. *Emerig*, tom. 1, p. 62, 63. *Pothier*, h. t. n. 179.

(*b*) By the ordinance of *Louis* XIV. h. t. art. 6, if an inſurance be made on the outward and homeward voyage, at an entire premium, and the ſhip arrive at her outward port of deſtination, but never returns, the inſurer ſhall return one third of the premium.

ſiſted of three diſtinct parts or voyages; viz. from *Honfleur* to *Angola*, from *Angola* to *St. Domingo*, and from *St. Domingo* back to *Honfleur*; and that, as this laſt voyage had never been commenced, the premium ought to be apportioned, and the part of it returned which was paid to inſure the riſk from *St. Domingo* to *Honfleur*.—Bnt the jury, upon that point, were clear that there ought to be no return.—Lord *Mansfield*, who tried the cauſe, upon turning the queſtion in his mind, entertained ſome doubts upon it, and deſired that a new trial might be moved for; which being done, the court, upon great conſideration, determined that this was one voyage, and one entire riſk; and that there could be no return of premium.---His lordſhip, in delivering the opinion of the court on this point, ſaid;---"On the fulleſt conſideration, and after looking into all the caſes, (though my opinion has fluctuated), we are now all clear that there ought not to be any any return. The queſtion depends upon this: Whether the policy be upon one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for by ſplitting the words, and taking *at* and *from*, ſeparately, it will make ſix. The principles are clear. When the riſk has never begun, there muſt be a return of premium; and if the voyages in this caſe are diſtinct, the voyage from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk have once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exception of *ſuicide and the hands, of juſtice*; if the party commit ſuicide, or be executed in twenty-four hours, there ſhall be no return. The caſe is the ſame if a voyage inſured be once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion. It is eſtimated on the whole at eleven *per cent*, and, which is extremely material, there is no where any contingency at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warranty, every ſhip muſt

The premium being entire, is a proof that the riſk is entire.

muſt be ſea-worty when ſhe ſails on the voyage inſured; but ſhe is not neceſſarily to continue ſo throughout the voyage; ſo that, if this be one entire voyage, if the ſhip was ſea-worthy when ſhe left *Honfleur*, the underwriters would have been liable though ſhe had not been ſo at *Angola*, &c. but according to the conſtruction contended for on the part of the plaintiff, ſhe muſt have been ſea-worthy, not only at her departure from *Honfleur*, but alſo when ſhe ſailed from *Angola*, and when ſhe ſailed from *St. Domingo*. The caſes of *Stevenſon* v. *Snow* (*a*), and *Bond* v. *Nutt* (*b*), were quite different from this. They depended upon this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place or not. This neceſſarily divided the riſk and made two voyages. In *Bond* v. *Nutt*, it was held that there were two riſks upon the ſame principle, "At *Jamaica*," was one. The other, viz. "From *Jamaica*," depended on the contingency of the ſhip having ſailed "*on or before the firſt of Auguſt.*" That was a condition precedent to the inſurance on the voyage *from Jamaica to London*. The two caſes of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinſon*, are very ſtrong; for, if you could apportion the premium in any caſe, it would be in inſurances *on time*."

Where the inſurance is for a *term*, and the premium is entire, if the riſk be begun, there ſhall be no return.

Tyrie v. *Fletcher*, Cowp. 666.

So, where the inſurance is for a term ſpecified in the policy, and for one entire premium; if the riſk be begun, and an event happen immediately after which determines the contract, there ſhall he no return of premium.

Thus:—A ſhip was inſured, 'At and from *London*, 'to any port or place whereſoever or whatſoever, for '*twelve months*, from the 19th of *Auguſt* 1776, war-'ranted free from capture or ſeizure by the *Americans*.' The premium was 9l. *per cent.*—The ſhip was taken by an *American* privateer, about *two months* after ſhe ſailed.

(*a*) Sup. 655.——(*b*) Sup. 353.

The

—The inſured brought an action to recover a proportion of the premium for the reſidue of the time. The court determined that the riſk was *entire*; and, having been once begun, there could be no return of any part of the premium. Lord *Mansfield* ſaid,—"This caſe is ſtript of every authority. There is no caſe, or practice, in point; and therefore we muſt argue from general principles applicable to policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable to this queſtion. The *firſt* is, that where the riſk has not been begun, whether this be owing to the fault, pleaſure, or will, of the inſured, or to any other cauſe, the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity; the underwriter receives a premium for running the riſk of indemnifying the inſured; and, to whatever cauſe it be owing, if he do not run the riſk, the conſideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the riſk has once commenced, there ſhall be no apportionment or return of premium afterwards: For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it was commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the entire riſk; and no part of the conſideration ſhall be returned; and yet it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies*, agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun, by an *American* captor, there is not a colour to ſay that there ſhould have been a return of premium. So much, then, is clear; and indeed perfectly agreeable to the ground of determination in *Stevenſon* v. *Snow* (*a*). For, in that caſe, the intention of the parties, the nature of the contract, the conſequences of it, ſpoke manifeſtly *two* inſurances, and a *diviſion* between them. The firſt

(*a*) Sup. 655.

object

object of the inſurance was from *London* to *Halifax*: But if the ſhip did not depart from *Portſmouth* with the convoy ſpecified, then there was to be no contract from *Portſmouth* to *Halifax*. The parties, then, have ſaid, 'We 'make a contract from *London* to *Halifax*; but, on a cer- 'tain contingency, it ſhall only be a contract from *Lon- 'don* to *Portſmouth*.' That contingency not happening, reduces it, in fact, to a contract from *London* to *Portſmouth* only. The whole argument turned upon that diſtinction, and all the judges, in delivering their opinions, lay the ſtreſs upon the contract compriſing *two diſtinct conditions*, and conſidering the voyage as being, in fact, *two voyages*: And this was the equitable way of conſidering it; for though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly on that ground; but that was the opinion of the court. There was an uſage alſo found by the jury in that caſe, that it was *cuſtomary* to return a proportionable part of the premium in ſuch caſes, but they could not ſay *what* part. The court rejected this, as a void *uſage*, for the uncertainty; but they argue from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of the merchants, as to the propriety of returning a part of the premium in ſuch caſes: And there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put where the meaſure is by *time*, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is, an inſurance upon a man's life for twelve months: There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it; for the inſured would demand double the premium for *two* years that he would take to inſure the ſame life for *one* year only. In ſuch policies there is a general exception againſt ſuicide.—If the perſon put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was an idea that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, " At and from, *provided* the ſhip " ſails

If a man's life be inſured for 12 months, with an exception of ſuicide, and he kill himſelf the next day; there ſhall be no return.

" ſails on or before the firſt of *Auguſt* (*a*);" and Mr. *Wallace* conſiders, in that caſe, that the whole policy would depend upon the ſhip's ſailing before the ſtated day. I do not think ſo. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loſs in port, *before* the day appointed for the ſhip's departure, can never be coupled with a contingency *after* the day: But if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of *Stevenſon* v. *Snow*; and that there were two parts, or contracts, of inſurance, with diſtinct conditions: The *firſt* is, 'I inſure the ſhip in port, againſt loſs before the 'firſt of *Auguſt*:' And, *ſecondly*; 'If ſhe ſhould not be loſt 'in port, I inſure her then, during her voyage, from the 'firſt of *Auguſt*, till ſhe reach the port ſpecified in the po-'licy.' The loſs in port muſt happen before the riſk upon the voyage could commence; and, *vice verſa*, the riſk in port muſt ceaſe the moment the riſk upon the voyage began (*b*).—Let us ſee then, what the agreement of the parties is, in the preſent caſe. They might have inſured from two months to two months; or in any leſs or greater proportion, if they had thought proper ſo to do: But the fact is, that they have made no *diviſion of time* at all; but the contract entered into was one entire contract from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the *inſured*; 'If 'you, the underwriter, will inſure me for 12 months, I

If an inſurance be '*at and from*,' *provided* the ſhip ſails on or before ſuch a day:—Whether this be two riſks, or only one entire riſk.

(*a*) It muſt be owned that the caſe thus put has much of ſubtilty in it. One part of it ſeems repugnant to the other. Mr. *Wallace* appears to have given it the beſt anwer it would admit of. The word *provided* makes the ſailing on or before the firſt of *Auguſt* a *condition* upon which the contract is to take effect; and if this be ſo, the word "*at*" in the policy is quite nugatory.——(*b*) This extrajudicial opinion, ſeems to have been rather haſtily delivered, or perhaps, not very accurately reported. See the caſe of *Meyer* v. *Gregſon*, ſup. 658, which ſeems to be nearly the caſe put by Mr. *Dunning*, and in which Lord *Mansfield* and the reſt of the judges of the *King's Bench* decided that there ſhould be no return of premium.

'will

'will give you an entire ſum; but I will not have any ap-'pointment.'—The ſhip ſails, and the underwriter runs the riſk for *two* months; no part of the premium, then, ſhall be returned.—I cannot ſay, if there had been a recapture before the expiration of the 12 months, that the policy would not have revived."

Even if the premium for a year be computed at *ſo much per month*; yet, being a groſs ſum, it is not a monthly inſurance.

In the foregoing caſe, Lord *Mansfield* intimated an opinion that where the premium is entire, it is one proof that the riſk is meant to be entire. In the following caſe, the court of *King's Bench* carried this idea ſtill farther, and decided that if, upon an inſurance for a year, a groſs premium be given; but it is expreſſed in the policy to be *at ſo much per cent. per month*; this ſhall be deemed only a mode of computing the groſs ſum, and does not make the contract a monthly inſurance.

Loraine v. *Tomlinſon*, *Doug.* 564.

An inſurance was made on a ſhip againſt *capture* only, *for twelve months*, in the coaſting trade. The plaintiff underwrote 200l. In the body of the policy it was ſtated, 'That the inſurers confeſſed themſelves paid the conſider-'ation due to them by the inſured, *at and after the rate of* '15s. *per cent. per month*.' At the bottom oppoſite the plaintiff's ſubſcription, was written, 'Premium received 'the 15th of *March* 1779; and on the back was indorſed, '—*Newcaſtle* 15th *March* 1779, Mr. *J. G. Thomlinſon*, on 'his ſhip *Chollerford*, himſelf maſter, *for twelve months*, in 'the coaſting trade, at and between *Leith* and the *Iſle of* '*Wight*, beginning the 13th of *March* 1779, and ending 'the 12th of *March* 1780.'—The premium was, in fact, not paid, it being the uſage in *Newcaſtle* not to pay the premiums at the time of making inſurances, but at certain times afterwards.—The ſhip was *loſt in a ſtorm* within the firſt two months; and the inſured tendered the underwriter 3l. as the premium for two months.—The underwriter brought his action againſt the inſured to recover the whole premium of 18l. The defendant pleaded the tender, and paid the 3l. into court.—The court were clearly of opinion that the plaintiff was entitled to recover the whole premium.—Lord *Mansfield* ſaid,—"This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore, parol evidence ought not to

A ſhip inſured againſt *capture* for 12 months, is *loſt in a ſtorm* within two months. The premium is 9 *per cent.* and expreſſed in the policy to be at the rate of 15s. *per month*; yet there ſhall be no return.

have

have been admitted to explain it. It is an insurance for 12 months, for one gross sum of 18l. They have calculated this sum to be at the rate of 15s. *per* month. But what was to be paid down? Not 15s. for the first month, and so from month to month; but 18l. at once. Two cases have been mentioned. *Stevenson* v. *Snow* (*a*), was decided on the ground of there being two voyages. *Tyrie* v. *Fletcher* (*b*) is directly in point against the defendant." He then repeated the two rules laid down by himself in this last case.

Sect. III.

Upon the Performance of some Stipulation.

Where part is to be returned on the performance of some stipulation, this shall be returned though the insurer be obliged to pay a partial loss.

IT is frequently agreed between the parties that, upon the happening of a certain event, or the performance of some stipulation, the insured shall return a part of the premium; and clauses to this effect are then inserted in the policy. If, in such case, the event do happen, or the thing stipulated be performed, the insured shall be entitled to the return of premium agreed upon.

In time of war it is frequently stipulated that a part of the premium shall be returned, "*if the ship sail with* "*convoy and arrive.*" And upon the construction of this clause, several important questions have arisen.

If the stipulation be for a mere sailing with convoy, without specifying to any particular place, a sailing with convoy from one port to another in the same country, for the purpose of there joining convoy for the voyage, will be a sailing with convoy within the meaning of the stipulation.

Thus:—The ship *Ceres* was insured, 'At and from 'Oporto to *Lynn*, with liberty to touch and stay at any 'ports or places on the coast of *Portugal*, to join convoy, 'particularly at *Lisbon*; at 12 guineas *per cent.*, to return '61.

Audley v. *Duff*, 2 *Bos. & Pul.* 111.

A ship is insured at 12 guineas *per cent.* to return 6l. if she sail with convoy from the coast of *Portugal*, and arrive. She sails under con-

(*a*) Sup. 655.——(*b*) Sup. 662.

voy from *Oporto* to *Liſbon*, the general rendezvous, in order to ſail from thence with the whole fleet. The ſhips, in their paſſage from *Oporto* to *Liſbon*, being diſperſed, the ſhip inſured runs for *England* and arrives: —This is a ſailing with convoy, ſo as to entitle the inſured to the ſtipulated return.

'61. if ſhe ſailed with convoy from the coaſt of *Portugal* 'and arrived.'—In an action to recover this 61. *per cent.* of the premium, it appeared that, at the time the *Ceres* was to ſail, there were many merchant ſhips collected in the different ports of *Portugal*, and Lord *St. Vincent*, the commander of that ſtation, being unable to afford ſeparate convoys for *England*, from each port in *Portugal*, ſent a cutter and a ſloop to fetch the trade from *Oporto* to *Liſbon*, where they were to lie in the bay of *Doyras*, without entering the port of *Liſbon*, to avoid the *Liſbon* duties. From that place a convoy was appointed for the whole trade to *England*. The *Oporto* fleet in proceeding to *Liſbon*, being diſperſed, loſt the convoy, and the *Ceres*, then judging it for the beſt, ran for *England*, and arrived.—It was contended on the part of the defendant, that the *Ceres* never *left* the coaſt of *Portugal* with convoy.—Lord *Eldon*, who tried the cauſe, told the jury that, as the *Oporto* trade had put themſelves under the convoy of the cutter and ſloop which formed a part of the aggregate convoy for *England*, they had deprived themſelves of all power of acting for themſelves, and had therefore departed with convoy from the coaſt of *Portugal*. He added, that the liberty given by the policy to touch at other ports on the coaſt of *Portugal*, did not vary the inference of her being under convoy for *England* from the moment ſhe received ſailing inſtructions; and from that time the liberty ſo given was at an end. The jury, under this direction, found a verdict for the plaintiff.—Upon a motion to ſet this verdict aſide, and enter a nonſuit, the court were clearly of opinion that the event had happened on which the plaintiff's title to a return of premium was to attach, and therefore that the verdict was right.—Lord *Eldon* ſaid,—" It being unknown in *England* from what port or coaſt of *Portugal* the convoy would ſail, the clauſe for a return of premium was to be adapted to the circumſtances of the caſe. The departure with convoy might be from *Oporto*, or it might be from ſome other place. It became neceſſary, therefore, to introduce ſome expreſſion, which extended to ſomething more than a mere departure from *Oporto*. The fair interpretation of the agreement is, that the inſured ſhall have the benefit

of

of the policy, though the ſhip ſhould ſail from *Oporto* without convoy; but that if ſhe ſailed from *Oporto*, which is on the coaſt of *Portugal*, with convoy, then there ſhould be a return of premium."

Upon the effect of the word "*arrives*," ſeveral caſes have been determined. In the firſt of theſe, it was holden that this word relates to the arrival of the *ſhip*, and not to the arrival of the goods on board, even where the inſurance is on the goods only.

The word *arrives* relates only to the *ſhip*, even in a policy on goods.

Thus:—An inſurance was made,—'At and from any 'port or ports in *Grenada* to *London*, at 18 guineas *per* '*cent. to return* 8l. *per cent.* if ſails from any of the *Weſt* '*India* iſlands, with convoy for the voyage, *and arrives.*' At the bottom of the policy there was written a declaration that it was on ſugars, valued at 20l. *per* hogſhead. The ſhip ſailed with convoy within the time limited, having 51 hogſheads of ſugars on board. She arrived ſafe in the *Downs*, where the convoy left her as uſual. She afterwards ſtruck on a ſand bank near *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off, and arrived ſafe in the port of *London*. The ſugars ſaved were carried to *London* in other veſſels, and the 40 hogſheads being ſold, produced 340l. inſtead of 800l. their valuation in the policy. An action was brought againſt the underwriters for a return of premium.—The defendant paid into court 8l. *per cent.* on 340l. The plaintiffs inſiſted that they were entitled to have 8l. *per cent.* returned on the *valued price* of the whole 51 hogſheads.—At the trial, before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand.—Upon a motion for a new trial, the principal queſtion was upon the effect of the word "*arrives*."—For the plaintiff it was inſiſted that this word related only to the arrival of the *ſhip*; that, in policies of this ſort, the intention is, that the underwriters ſhall take the war riſk upon themſelves; but that, if the veſſel be protected by convoy from *that riſk*, and actually arrive, they ſhall then return as much of the premium as was neceſſary to cover it.—On the other ſide, it was contended that, as the words of the policy muſt be applied to the ſubject matter of the inſurance,

Simond v. *Boydell*, *Doug.* 255.

Goods are inſured from *Grenada* to *London*, at 18 guineas *per cent.* "to return "8l. *per cent.* if "ſails with convoy and arrives."—The arrival of the *ſhip* is what is meant, and the ſhip having ſailed with convoy, the inſured is entitled to a return of 8l. *per cent.* on the ſum inſured, notwithſtanding any partial loſs on the goods.

rance, which in this caſe was on the *goods*, not on the ſhip, the return of premium could, at moſt, be only on the value of the ſugars which actually came to *London*; whereas, if the defendant muſt pay the valued amount of the ſugars loſt, and the difference between the valued price and the actual produce of the ſugars ſaved, and alſo return 8l. *per cent.* upon the whole, the inſured would be conſiderable gainers by the loſs.—The court determined that the arrival of the *ſhip* was what was meant by the policy; and that the plaintiff was entitled to a return of full 8l. *per cent.* on the ſum inſured, notwithſtanding the partial loſs on the goods.—Lord *Mansfield*, after obſerving how very inattentive thoſe who introduce additional clauſes into policies are to their import, ſaid,—"I do not doubt, however, how we are to conſtrue this policy. Dangers of the ſea are the ſame in peace and war: But war introduces hazards of another ſort, depending on a variety of circumſtances; ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy; and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium; and in that caſe, the underwriter ſays: "If it turn out that the ſhip do depart with convoy, "I will return part of the premium." But a ſhip may ſail with convoy, and be ſeparated from it by a ſtorm, or other accident, in a day or two, and loſe its protection. On a warranty to ſail with convoy, that would not be a breach of the condition: But, to guard againſt that, the inſured adds, in policies of the preſent ſort; "The "ſhip muſt not only ſail with convoy, but ſhe muſt *arrive* "to entitle you to the return." The words, "*and ar-* "*rives*" do not mean that the ſhip ſhall arrive in the company of the convoy; but only that ſhe herſelf ſhall arrive. If ſhe do, that ſhews, either that ſhe had convoy the whole way, or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods, on the arrival of the ſhip. The conſtruction contended for by the defendant is *adding a comment longer than the text.* If it had been

How the ſtipulation that a part of the premium ſhall be returned, if the ſhip ſail with convoy, muſt be underſtood.

The words "*and* "*arrives*" refer to the *ſhip*, not to the goods inſured.

been meant that no return ſhould be made unleſs all the "goods arrive ſafe, they would have ſaid; "If the ſhip arrive "*with all the goods*; or, *ſafely with all the goods.*" The total or partial loſs of the goods was the ſubject of the *indemnity*, and muſt be paid for by the underwriter. But as to the return of the additional premium; whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which governs is, that, in the events that have happened, the war riſk has been rated too high."

So, where the freight of the ſhip *Jackſon* was inſured, 'At and from *Jamaica* to *London*, warranted to ſail on 'or before the 26th of *July* 1796, with convoy for the 'voyage, at a premium of 10 guineas *per cent. to return* '2l. *per cent.* if ſhe ſailed on or before the 1ſt of *July* '1796, and arrived.'—Afterwards, by a memorandum indorſed on the policy, on the 15th of *Auguſt* 1796, and ſigned by the underwriters, it was agreed, in conſideration of 10 guineas *per cent.* additional premium, that the warranty of ſailing with convoy ſhould be annulled, and the defendant undertook to return 10l. *per cent.* "*if the ſhip ſailed with convoy and arrived.*" The ſhip ſailed from *Jamaica* on the 26th of *July*, with convoy, but ſeparated in bad weather, and was captured on the 26th of *October*, recaptured on the 5th of *November*, and carried into *Cork*, where ſhe was delivered up to the owners, on paying 9l. 14s. 7d. *per cent.* for ſalvage. She afterwards arrived at the port of *London* with her cargo. In an action on the policy, with a count for a return of premium, the defendant paid into court 19l. 9s. 2d. the amount of the ſalvage on 200l. his ſubſcription.—The plaintiffs obtained a verdict for the premium, and, upon a motion to ſet it aſide, the court determined that, according to the true conſtruction of the memorandum, the inſured was entitled to the return of premium there ſtipulated.—Lord *Kenyon* ſaid,—"I agree with the defendant's counſel, that every arrival of the ſhip at her port of deſtination, would not be an arrival within the fair conſtruction of the memorandum; ſuch, for inſtance, as an arrival in the poſſeſſion of an enemy at a neutral port; or an arrival at her port in *England*, as the property

Aguilar and others v. *Rodgers*, 7 T. R. 421.

The inſurer on freight agrees to return part of the premium, "if the ſhip ſail with convoy and *arrive.*"—The ſhip having ſailed with convoy and arrived, the inſured ſhall have the return, though the ſhip being captured and recaptured, the underwriters were obliged to pay ſalvage.

perty of other perſons after a capture. But, in order to ſatisfy the memorandum, it ſhould be an arrival at the deſtined port, *in the courſe of the voyage*; and, in this caſe, the ſhip did arrive at the port of *London*, in the courſe of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez* (*a*), even if we were diſpoſed ſo to do, which I am not, where it was holden that though the inſured may abandon on hearing of a capture, yet if they do not abandon, and the ſhip be afterwards recaptured, it muſt be conſidered as if ſhe had never been out of the poſſeſſion of the owners. It is 18 years ſince the caſe of *Simond* v. *Boydell* (*b*) was decided. That caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added, after "*arrived*," the words "*ſafely from the enemy*" or ſome others to that effect. But the words here uſed are not equivocal, and we ought not to depart from them. It would be attended with great miſchief and inconvenience if, in conſtruing contracts of this kind, we were not to decide according to the words uſed by the contracting parties. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, I am of opinion that the verdict ought not to be ſet aſide."

So, if the ſhip ſail with convoy and arrive, this will entitle the inſured to the ſtipulated return of premium, though the goods inſured be afterwards loſt, and the underwriters be obliged to pay a total loſs.

Hornecaſtle v. *Haworth*, before Sir *J. Mansfield*, C. J. at G. H. 26th *February* 1806.

Thus: Goods were inſured on board the *Marquis of Lanſdown* from *London* to *Dominica*, at a premium of 8 guineas *per cent.* to return 4l. *per cent.* "*if ſails with convoy and arrives.*"—The ſhip ſailed with convoy, and arrived on the 6th of *February* 1805, at the port of *Roſeau* in *Dominica*, and began unloading, and continued till the 22d of *February*, when a *French* fleet arrived, and, amongſt others, captured the *Marquis of Lanſdown*, with the goods inſured on board.—In an action on the policy,

The ſhip ſails with convoy and arrives, but the goods inſured are afterwards totally loſt:—The inſured is entitled to a return of premium, as well as to a total loſs.

(*a*) Sup. 572.——(*b*) Sup. 671.

the

the plaintiff claimed not only a total loſs by the capture, but alſo 4l. *per cent.* return of premium, the ſhip having ſailed with convoy and arrived.—Sir *James Mansfield*, C. J. who tried the cauſe, was at firſt of opinion that the the plaintiff was not entitled to any return of premium; but the above caſe of *Simond* v. *Boydell* (*a*) being cited, he yielded to the authority of it, and directed the jury to give the plaintiff the 4l. *per cent.* return of premium, together with the total loſs.

If it be agreed to return different portions of the premium in caſe the ſhip ſail with convoy for different portions of the voyage, *and arrive*; this means an arrival at the ſhip's ultimate port of deſtination.

The words "*and arrives*" mean an arrival at the ſhip's ultimate deſtination. *Kelner* v. *Le Meſurier*, 4 *Eaſt* 396.

As where a ſhip was inſured 'At and from *Liſbon* to '*Cadiz*, and at and from thence to *Fluſhing*, at a pre-'mium of 20 guineas *per cent.* to return 8l. *per cent.* if 'the ſhip ſailed from *Cadiz* with convoy for *England*, and '2l. *per cent.* more for convoy from *England* to *Fluſhing*; 'or 10l. *per cent.* if with convoy for the voyage, *and ar-'rives*.'—The ſhip having ſailed from *Liſbon* to *Cadiz*, ſailed from thence under convoy for *England* and arrived; but was there ſeized and taken as prize. In an action upon the policy, one queſtion was, whether the inſured was entitled to a return of 8l. *per cent.* the ſhip having ſailed with convoy from *Cadiz* to *England*, and arrived there?—Upon this queſtion the court determined that no return of premium was demandable within the meaning of the policy, the ſhip never having arrived at *Fluſhing*, her ultimate port of deſtination.—The reaſon given for ths deciſion was, that the words "*and arrives*" annex a condition which over-rides and governs equally *all* the ſeveral ſtipulations for a return of premium, in the events of a ſailing with convoy for the different parts and ſubdiviſions of the voyage; and that, as the whole 10l. *per cent.* is made returnable upon a ſailing with convoy for each part of the voyage, and arriving at *Fluſhing*, there could be no reaſon why the 8l. and the 2l. *per cent.* ſhould be made reſpectively returnable on account of the mere ſailing with convoy for the

Policy on a ſhip from *Liſbon* to *Cadiz*, and from thence to *Fluſhing*, at 20 guineas *per cent.* to return 8*l.* for convoy from *Cadiz* to *England*, and 2*l.* more for convoy from *England* to *Fluſhing*, and *arrives*.—The ſhip arrives under convoy in *England*, where ſhe is captured.—The inſured is not entitled to a return of 8*l. per cent.* the ſhip never having arrived at *Fluſhing*.

(*a*) Sup. 671.

reſpective parts of the voyage, independently of the ſame event of ultimate arrival; and eſpecially when the underwriter could derive no benefit from ſuch partial convoy, but would have a total loſs to pay.

If, before the ſhip can ſail with convoy, the underwriters be diſcharged, the inſured ſhall be entitled to a return for convoy.

If it be ſtipulated that there ſhall be a return of part of the premium for ſailing with convoy and arrival, and, in conſequence of the breach of ſome warranty, or the non-performance of ſome ſtipulation, or of a deviation, the underwriters be diſcharged before the ſhip can ſail with convoy, the inſured ſhall be entitled to the ſtipulated return of premium; becauſe the diſcharge of the underwriters is, to them, equivalent to a ſailing with convoyand arrival.—As where a ſhip was inſured at and from *Jamaica* to *Liverpool*, warranted to ſail on or before the firſt of *Auguſt*, at a premium of 20 guineas *per cent.* to return 8*l.* *per cent.* if ſhe ſailed with convoy. The ſhip did not ſail till *September*, and in an action for a return of premium, it was admitted that the inſured was entitled to a return of 8*l.* *per cent.* for convoy (*a*).

Sect. IV.

Of the Deduction of one-half per Cent. upon a Return of Premium.

AS the inſurer can never, by his own act, diſcharge himſelf from the contract, it ſeems but reaſonable that, where the inſured thinks proper to put a ſtop to the adventure, and prevent the riſk from ever commencing, he ſhould make ſome compenſation to the inſurer for his trouble and diſappointment; it is therefore the general cuſtom in all the maritime countries of *Europe*, to allow him to retain one-half *per cent.* (*b*).—This the *French* denominate *droit de ſignature*. *Pothier* (*c*) thinks it is given to compenſate the inſurer for the loſs he ſuſtains by the non-

(*a*) *Meyer* v. *Gregſon*, ſup. 658.——(*b*) *Molloy*, b. 2 c. 7, § 12.——(*c*) h. t. n. 181.

performance

performance of the contract on the part of the insured: *Emerigon* (*a*) says, it is for his trouble in signing the policy, and making the proper entry in his books; and this is the reason given in *Le Guidon* (*b*).

It is allowed to the insurer where the contract is void for some radical defect, provided this were unknown to him when he entered into the contract (*c*). But if he were informed of the fault, or must have known it, before he subscribed the policy; as if he were to insure a ship or goods, when he knew of their safe arrival, or seamen's wages, or contraband goods, knowing them to be such, he could have no claim to this allowance (*d*).

Pothier holds that if the contract become void, not by the act of the insured, but by some cause which he could not prevent or control, the insurer shall not be entitled to the half *per cent* (*e*).—*Emerigon*, on the contrary, maintains that in all cases where the policy becomes void, without any fraud on the part of the insurer, he shall have this allowance (*f*).

(*a*) Tom. 2, p. 168.——(*b*) Ch 2, art. 16.——(*c*) Ord. of *Antwerp*, art. 14, 2 *Mag.* 27.——(*d*) *Valin* on art. 10, 16, 17, h. t. *Pothier*, h. t. n. 183, *Emerig.* tom. 2, p. 169.——(*e*) *Pothier*, h. t. n. 181.——(*f*) *Emerig.* tom. 2, p. 169. Vid. *Le Guidon*, ch. 2, art. 16, ord. of *Amst.* art. 22. ord. of *Antwerp* art. 16. 2 *Mag.* 27, 28.

CHAP. XVI.

Of the Proceedings in Actions on Policies of Insurance.

IN treating of actions on policies of insurance we will inquire,

I. *In what courts they may be brought;*
II. *Of the declaration;*
III. *Of the plea, and bringing money into court;*
IV. *Of the consolidation rule;*
V. *Of the trial;*
VI. *Of the recovery back of losses, improperly demanded.*

Sect. I.

In what Courts Actions on Policies of Insurance may be brought.

The courts of common law have the sole jurisdiction in matters of insurance.

Insurance being a marine contract, the law which regulates it, is considered in most of the commercial states of *Europe*, as a branch of marine law, and therefore, where no commercial tribunal is established, questions arising upon this contract, generally belong to the jurisdiction of the courts of admiralty (*a*). In *Scotland* this is, in the first instance, a subject of admiralty jurisdiction. But I do not find that in *England* courts of admiralty have ever had jurisdictions in questions of insurance (*b*). In a former part of this work (*c*) I took occasion to observe, that although the modes of administering justice in our courts of common law, are so well suited to the investigation and decision of all commercial questions; yet, that it was not till towards the end of Queen *Elizabeth*'s reign, that ac-

(*a*) Vid. *Emerig.* t. 2, p. 319 ——— (*b*) For this consult *Zouch* on the jurisdiction of the admiralty. ——— (*c*) Sup. 24.

tions

tions upon policies of insurance began to be brought in the courts of *Westminster*; and that the legislature, even then, conceiving that questions upon this contract ought not to be litigated in those courts, being governed by certain rules unknown to the common law, erected a court for the sole purpose of determining such causes; but that, though the powers of this court were greatly enlarged in a subsequent reign, yet it soon fell into disuse, and the determination of all questions arising out of this contract has long since exclusively belonged to the courts of common law.

Courts of equity have no more jurisdiction in cases of insurance than in those of the purest common law cognizance. They do, indeed, sometimes, in cases of insurance, as in all other cases, interpose their authority for the advancement of justice. They will compel a trustee to permit his name to be used by the *cestui que trust* in an action on a policy of insurance (*a*); they will issue commissions for the examination of witnesses residing abroad, or out of the jurisdiction of the court, and grant injunctions to stay the proceedings at law till the return of such commissions (*b*); they will compel a party charged with fraud to make a full discovery upon oath of all circumstances, within his knowledge, which may lead to a discovery of the real facts of the case; and deliver up, or permit an inspection of, all papers and documents which are material to the matters in dispute. But, except in such cases, it has been solemnly determined, that courts of equity have no jurisdiction in questions of insurance (*c*).

Courts of equity have no jurisdiction in such cases,

It may be proper, in this place, to mention, that the authority of the supreme courts of *Westminster* is so transcendant, that nothing but the express words of an act of parliament can take away or abridge their jurisdiction

The parties cannot, by agreeing to submit their differences to arbitration, oust the supreme courts of the jurisdiction.

(*a*) Per Lord *Hardwicke*, 1 *Atk.* 457.——(*b*) R. *Chitty* v. *Selwin*, 2 *Atk.* 359.——(*c*) R. upon demurrer in Chancery, and confirmed in the House of Lords upon appeal, *De Gheloff* v. *Lond. Assur.* 3 *Bro.* Parl. Ca. 525; Per Lord *Hardwicke*, 1 *Atk.* 457.

in any caſe (*a*); and therefore a clauſe inſerted in a policy, that, in caſe of any diſpute between the parties, it ſhall be referred to arbitration, is merely nugatory; for, without it, the parties may, if they think proper, ſubmit their differences to arbitration; and with it, neither can *compel* the other to do ſo; for the agreement of the parties cannot ouſt the ſupreme courts of their juriſdiction (*b*). If indeed, an award be actually made, it will be a bar to an action; or if the parties have ſubmitted their differences to arbitration, and the reference be ſtill depending, that, perhaps, may alſo be a bar (*c*).

Sect. II.

Of the Declaration.

Special *aſſumpſit* is the proper form of action againſt private underwriters.

THE common policy of inſurance, ſubſcribed by private underwriters, being only a written undertaking, not under ſeal, is but a ſimple contract, and therefore, aſſumpſit is the proper form of action to be brought upon it, againſt the underwriters. And as the action in ſuch caſe is founded on a particular and expreſs undertaking, made upon a conſideration upon which the law would not, by neceſſary implication, raiſe the promiſe ſpecified in the policy, the plaintiff muſt declare ſpecially upon it.

Heads of the declaration.

In this, like every other caſe of ſpecial *aſſumpſit*, the contract muſt be ſet forth with preciſion; for any material variance or omiſſion will be fatal (*d*).—The declaration muſt therefore recite the policy, which is alledged to have been made according to the cuſtom of

(*a*) 2 *Hawk.* P. C. 286, 2 *Bur.* 1042.—— (*b*) R. *Kill* v. *Holliſter*, 1 *Wilſ.* 129. The ſame principle prevails in the *French* courts. There the judges will permit queſtions of *fact* or of *uſage* to be referred to merchants; but they will never ſuffer any queſtion of law to be ſubmitted to the deciſion of ſuch perſons. *Pothier*, h. t. n. 201. —— (*c*) Per Cur. 1 *Wilſ.* 129, ſed Q.——(*d*) Vid. *Gilb.* law of evid. 193.

merchants,)

merchants), with ſuch warranties and ſtipulations as may have been introduced into it, with an averment that the defendant had notice of the policy.—It then alledges, that in conſideration that the plaintiff had paid his premium to the defendant, and had promiſed to perform all things on his part to be done, the defendant promiſed to become an inſurer for the ſum ſubſcribed by him, upon the terms mentioned in the policy, and that he would perform all things, on his part, as to that ſum; and alſo that he had ſubſcribed the policy as an inſurer for that ſum. That the inſured was, at the time of the inſurance, and at the time of the loſs, intereſted in the ſhip or goods inſured, to the amount of the value in the policy, if it be a valued one, or to the amount of the ſums ſubſcribed, if it be an open one. —It then ſtates that the ſhip, &c. on a certain day was in good ſafety at her port of departure; that ſhe ſailed on the voyage inſured within the time mentioned in the policy, if a time be limited for her ſailing; and with convoy, if there be a warranty for her ſo doing;— and it likewiſe avers an exact compliance with every other warranty expreſſed in the policy.—The loſs is then ſtated, which muſt appear to have been occaſioned by ſome of the perils inſured againſt; and this muſt be ſhewn with reaſonable certainty, that the inſurer may have notice of the caſe againſt which he is to prepare his defence.—Notice to the defendant of this loſs, and a demand of the ſum ſubſcribed by him are then averred: —And laſtly, the breach of the contract by the non-payment of the ſum ſubſcribed by the defendant.

This is the general outline of a declaration upon a common policy, ſubſcribed by individual underwriters in an ordinary caſe. When there are any particular circumſtances, it behoves the plaintiff to be careful to adapt his declaration to them.—It is uſual to add a count for money had and received by the defendant to the plaintiff's uſe, to enable the plaintiff to recover back his premium, if, under all the circumſtances, he ſhould appear to be entitled only to that, or a part of it.

Count for money had and received.

It is not neceſſary to declare ſpecially upon an adjuſtment. The inſured may give it in evidence upon the uſual declaration upon the policy.

When a loſs has been adjuſted, and the adjuſtment ſigned by the inſurer in the uſual manner, the inſured, in order to recover this loſs, is not obliged to declare ſpecially upon the adjuſtment as upon a new contract; but may declare upon the policy in the uſual manner, and give the adjuſtment in evidence, which, as we formerly obſerved (*a*), is equivalent to an admiſſion, though not concluſive, of all the facts neceſſary to be proved, to entitle the inſured to recover upon the policy (*b*).

The averment of intereſt may be either general or ſpecial.

The *averment of intereſt* in the inſured may be either general or ſpecial. Under a general averment of intereſt the plaintiff may give in evidence any intereſt he may have in the thing inſured. But if the intereſt be averred ſpecially, it muſt be proved as ſtated. The general averment is, therefore, in moſt caſes, to be preferred. Nor can I ſee any neceſſity for a ſpecial averment, unleſs the queſtion of intereſt be the only matter in diſpute between the parties, and the plaintiff mean to put this upon the record, in order to ſave the expence of a trial (*c*).

But the general averment is ſufficient not only as to the *title*, but alſo as to the *quantum* of intereſt.

The general averment is ſufficient, not only as to the *title* or *claim* of the inſured, but alſo as to the *quantum of intereſt*. In aſſumpſit the plaintiff recovers damages according to the evidence, *pro tanto*; and, therefore, if he aver intereſt generally, in the entire thing inſured, he ſhall recover for the loſs in proportion to the *quantum* of intereſt he proves (*d*).

The declaration need not ſtate the *ſpecies* of goods put on board the ſhip.

If in the policy the inſurance be declared to be on a particular ſpecies of goods, it is ſufficient in alledging the loading theſe goods on board, to ſtate "that divers goods, wares, and merchandizes of ſuch a value were

---

(*a*) Sup. ch. 14, § 3.—(*b*) Per Lord *Kenyon*, at N. P. *Rodgers* v. *Maylor*, ſup. 634.—(*c*) See the caſe of *Crawford* v *Hunter*, ſup. 85, where the intereſt was ſpecially averred, probably to bring the queſtion of intereſt, which, in that caſe, was a mere queſtion of law, to an immediate deciſion upon demurrer.—(*d*) R. *Riſing* v. *Burnett*, inf.

loaded

loaded on board," &c. without ſpecifying the particular goods (*a*).

If the inſurance be made in the name of an agent, the action may be brought either in his name or in the name of the principal; and in either caſe it muſt be averred that the policy was made in the name of the agent, as agent, for the uſe of the principal, who is averred to have been intereſted in the ſhip or goods inſured, to the amount of the ſum inſured, or the value in the policy.

If the inſurance be in the name of an agent, it muſt be averred for whoſe uſe.

In averring intereſt in the inſured, it is ſufficient to ſhew it to have been in thoſe who had the property *at the time of making the policy*.—Therefore, where it was averred in the declaration, that *P. Maingy* and *N. Maingy*, until, and *at the time of making the policy*, and alſo at the time of the loſs, were intereſted in the goods mentioned in the policy; and that the ſaid inſurance was made for the ſaid *P. M.*, and *N. M.*, and for their account.—In the courſe of the cauſe it appeared that a Mr. *Le Meſurier* had, ſince the policy was effected, become a partner with *P. M.* and *N. M.*, and had taken a ſhare of all the ſtock, *including the goods inſured*. Upon this it was urged on the part of the defendant, that the plaintiff ſhould be nonſuited; for as Mr. *Le M.* was intereſted in the goods inſured, the averment of intereſt in the declaration was diſproved.—But Mr. Juſtice *Buller*, who tried the cauſe, refuſed to nonſuit the plaintiff, being of opinion that as Mr. *Le M.* was not intereſted *at the time of making the policy*, to which the averment of intereſt related, the plaintiff had brought the action properly for thoſe only who were intereſted at that time (*b*).

Perchard v. *Whitmore*, at N. P. after *Mich.* 1786, 2 *Boſ. & Pul.* 155. n.

In averring the intereſt, it is ſufficient to ſhew it to have been in thoſe who had the property at the time of making the inſurance.

In this caſe it ſeems to have been taken for granted, that if Mr. *Le M* had been a part owner at the time the policy was effected, the plaintiff muſt have been nonſuited. Yet the following caſe ſhews that, even in

(*a*) R. on ſpecial demurrer; *De Symons* v. *Johnſton*, 2 New Rep. 77. ——(*b*) And yet, the uſual form of the averment alleges that the inſured was intereſted not only at the time when the inſurance was effected, but alſo *at the time of the loſs*.

that

that caſe, the averment would be ſufficiently ſupported by the evidence.

Page v. *Fry*, 2 *Boſ.* and *Pul.* 240.—3 *Eſp.* Rep. 185.

A policy was effected on a cargo of corn by the plaintiff, as agent to *Hyde* and *Hobbs*.—In the declaration on this policy, it was averred that *Hyde* and *Hobbs* were, 'at the time of loading the ſaid corn on 'board the ſaid ſhip, and at the time of ſubſcribing the 'policy, and alſo at the time of the loſs,' intereſted in the ſaid corn, *to the amount of all the money inſured thereon*, and that the ſaid policy ſo made in the name of the plaintiff, was made for the uſe, riſk, benefit, and account of the ſaid *Hyde* and *Hobbs*.—Upon the trial before Lord *Eldon*, it appeared that after *Hyde* and *Hobbs* had purchaſed the corn on their own account, they, thinking the engagement might be too large for them, offered another houſe a ſhare in the corn, which was accepted; *Hyde* and *Hobbs* having informed the plaintiff of this, directed him to effect the inſurance on the cargo. *Hyde* and *Hobbs* paid for the cargo, and invoices were made out to them.—It was objected, on the part of the defendant, that this evidence negatived the averment in the declaration, that the whole intereſt was in *Hyde* and *Hobbs*.—Lord *Eldon*, however, directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonſuit.—Upon that motion, the court were clearly of opinion that *Hyde* and *Hobbs* had an intereſt in the *entirety* of the cargo, ſufficient to ſupport the averment in the declaration, notwithſtanding other perſons had a beneficial intereſt in part.

A cargo is purchaſed by *A.* who parts with a ſhare in it to *B.*, and afterwards inſures it on his own account; *A.* may aver intereſt in himſelf alone. The fact of *B.*'s having been let into a ſhare in the adventure, does not negative the averment, *A.* having ſtill an intereſt in the entirety of the cargo.

Whether it be neceſſary to aver intereſt in a caſe not prohibited by the 19 *G.* 2. c. 37.

It has been holden (*a*) that before the ſtat. 19 *G.* II. c. 37, inſurances without intereſt were not illegal; and that, before that act, it was unneceſſary to aver intereſt in the inſured in any caſe whatever; and conſequently that, ſince that act, it is unneceſſary to aver intereſt in any caſe not prohibited by it.

Craufurd v. *Hunter*, 8 T. R. 13, ſup. 109.

Therefore, where commiſſioners, appointed under the ſtat. 35 *G.* III. c. 8. § 21. were authorized to take into

Commiſſioners for the care of foreign ſhips and

(*a*) Vid. ſup. 109.

their

their poſſeſſion and care all *Dutch* ſhips and effects brought into or detained in the ports of *Great Britain*, and to diſpoſe thereof according to ſuch directions as they might receive from the privy council, it was determined that theſe commiſſioners might inſure, in their own names, the ſhips and effects thus put under their care, while they were on their paſſage to this country; and that a count ſtating the nature of their truſt, and averring an intereſt in them, as ſuch commiſſioners, was good.—In the ſame caſe it was alſo determined, that a count averring that the ſhips inſured did not, at the time when the inſurance was effected, *belong to his Majeſty or any of his Subjects*, was likewiſe good, without any averment of intereſt (*a*).

goods ſeized by the King, may inſure in their own names, and declare on their own intereſt.

(*a*) The queſtion in the above caſe of *Craufurd* v. *Hunter* was, in another action on the ſame policy, brought by writ of error into the *Exchequer Chamber*, where, after ſeveral arguments, the judgment of the *King's Bench* was affirmed, vid. *Lucena* v. *Craufurd*, 3 *Boſ.* and *Pul.* 75, where the arguments of counſel, and of the judges are fully reported.—The cauſe was afterwards removed, by writ of error, to the *Houſe of Lords*, where a number of queſtions were propounded to the judges, who, differing upon ſeveral of them, delivered their opinions *ſeriatim*. Lord *Eldon*, who diſſented from the judgment of the *King's Bench* and *Exchequer Chamber*, took a moſt maſterly and comprehenſive view of the whole ſubject, and maintained his opinion by arguments which will, I am perſuaded, have the effect of reſtoring the doctrine of inſurable intereſt to its original and genuine principles, which, on ſome occaſions, ſeem to have been loſt ſight of. The reſult was, that a *venire de novo* was awarded, the cauſe was again tried before Lord *Ellenborough*, when a verdict was found for the plaintiffs upon the ſecond count of the declaration, which averred the intereſt to be in the King.—A bill of exceptions was tendered, which if perſevered in will bring the caſe once more before the *Exchequer Chamber*.—See a very full report of the arguments in the Houſe of Lords, 2 New Rep. 269. which, unfortunately, was not publiſhed till after the fourth chapter of this impreſſion on *inſurable intereſt* had been worked off.

This

This point has ſince, in the following caſe, been brought to a ſolemn deciſion.

Nantes v. *Thompſon*, 2 *Eaſt* 385. ſup 41.

A declaration on a policy on a *foreign ſhip* need not aver any intereſt in the inſured, though the words "*intereſt or no intereſt*" be not in the policy.

An inſurance was made, in the uſual form, on the ſhip *Hoop*, valued at £1406, and goods on board, at and from *Elſineur* to *Ferrol*, *Cadiz*, and *Carthagena*, warranted to depart with convoy for the voyage. The declaration averred, that the plaintiff gave the order to the agent employed to effect the policy, 'that the ſaid ſhip was not, at 'the time of effecting the policy, or at any other time, '*the property of his Majeſty or any of his ſubjects.*' It then ſtated, that the ſhip, in the courſe of her voyage, arrived and anchored in *Plymouth Sound*, and was there arreſted and detained by order of his Majeſty, and afterwards condemned as lawful prize; whereby ſhe became wholly loſt to the plaintiff, and to every other perſon to whom the ſame did or might appertain. To this there was a demurrer, aſſigning for cauſes, that it was not alleged for whoſe uſe, or on whoſe account, the policy was made, nor to whom the ſhip belonged; *nor what perſon or perſons were intereſted in the ſaid inſurance*; nor that the plaintiff, or any other perſon, *had any intereſt or property in the ſhip.*— In the argument it was contended, on the part of the defendant, that though it is competent to a foreigner, notwithſtanding the ſtat. 19 *G.* II. c. 37, to lay a wager on the event of a ſhip's ſafe arrival, without any intereſt in the property; yet, that a policy, in the terms and principle of it, unleſs otherwiſe expreſſed, imported a contract of indemnity, and therefore neceſſarily ſuppoſed an intereſt in the party for whoſe benefit it was made. That if that were the underſtanding of the parties, ſuch intereſt ought to be averred, otherwiſe it would be a deception upon the underwriter, who would, of courſe, demand a higher premium, becauſe, upon a mere wager policy, every loſs muſt be total; for in ſuch caſe there could be no abandonment or benefit of ſalvage. And, moreover, that the inſured in ſuch caſe has no intereſt in the preſervation of the ſhip, or her ability to perform the voyage, but is rather intereſted in inſuring the moſt deſperate riſks; againſt which the underwriter ought to have due warning, by the uſual words, "*intereſt or no intereſt*;"

intereſt."—But the court, on the authority of the above mentioned caſe of *Craufurd* v. *Hunter*, determined that, though theſe words were not in the policy, the declaration need not aver intereſt in the inſured (*a*).

One of ſeveral inſureds may alone ſue, and aver a ſole intereſt in himſelf.

If a policy be made in the names of two perſons, one of them may bring an action on it alone, and aver the ſole intereſt in himſelf; and proof of this will entitle him to recover (*b*).

The loſs muſt be averred to have ariſen from the true cauſe, and no other.

With reſpect to the *averment of the loſs*.—As this fact is often the principal matter in diſpute, it is neceſſary to ſtate the true cauſe of it with reaſonable certainty, that it may appear to have been a loſs within the policy, and for which the defendant is liable; and alſo, that he may have notice of the caſe which he is called upon to anſwer.—Therefore, if a ſhip be deſtroyed by the worms which infeſt the rivers in hot climates, the inſured cannot declare upon a loſs by the perils of the ſea (*c*). So, if a number of ſlaves periſh for want of ſufficient and proper food, occaſioned by extraordinary delay in the voyage, ariſing from tempeſtuous weather; the inſured cannot declare on this as a loſs by the perils of the ſea (*d*). So, if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, and ſhe be there captured, though not materially damaged; this muſt be averred as a loſs by *capture*, and not by the *perils of the ſea* (*e*).

So, if part of the ſhip's crew be taken away from their employment, at a critical moment, by an irreſiſtable force, and in conſequence the ſhip drive on ſhore, the injury, thus occaſioned, is a loſs *by the perils of the ſea*, and muſt be ſo averred in the declaration (*f*).

If, in a declaration upon a policy without intereſt, the loſs be averred to have been occaſioned by *capture*,

---

(*a*) Vid. 4 *Eaſt* 400. *Kellner* v. *Le Meſurier*.—(*b*) Per *Le Blanc* J. at N. P. *Marſh* v. *Robinſon*, 4 *Eſp.* Rep. 98.—(*c*) R. *Rhol* v. *Parr*, 1 *Eſp.* Rep. 444, ſup. 492.—(*d*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656, ſup. 491.—(*e*) Per Lord *Kenyon* at N. P. *Green* v. *Elmſlie*, *Peake* Rep. 212.—(*f*) R. *Hodgſon* v. *Malcolm*, 2 New Rep. 336, ſup. 490.

when, in fact, the ſhip was releaſed from the capture, and might have proceeded on her voyage; the inſured cannot recover; for the ſhip might have reached her deſtined port, which was the event inſured.—Had it been a policy *upon intereſt*, the inſured might have abandoned, and then the averment of a loſs by capture would have been good.

Kulen Kemp v. *Vigne*, 1 T. R. 304, ſup. 130.

A ſhip inſured, intereſt or no intereſt, is captured, but afterwards ſet at liberty in a condition to purſue the voyage inſured; but inſtead of that, ſails on a different voyage, and is loſt:—The inſured cannot recover as for a loſs *by capture*.

Therefore, where goods were inſured on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, *intereſt or no intereſt*, warranted a *Daniſh* ſhip.—In declaring on this policy it was averred, that 'Whilſt the ſhip was proceeding 'in her voyage from *Falmouth* to *Marſeilles*, and before ſhe 'could arrive at *Marſeilles*, ſhe was captured by the '*Spaniards*; and thereby the ſaid ſhip, and alſo the goods 'and merchandizes on board her, were totally loſt to the 'plaintiffs.'—Upon the trial it appeared, that the ſhip was taken by a *Spaniſh* privateer, and carried into *Ceuta*, where ſhe was condemned, but, upon appeal, was afterwards releaſed, and in a condition to purſue her voyage; but inſtead of proceeding to *Marſeilles*, which ſhe might have done, ſhe firſt ſailed to *Malaga* to refit, and from thence ſhe went on a voyage to *Bremen*, and in that voyage was loſt.—It was objected, on the part of the defendant, that the plaintiffs could not recover upon this form of declaring, for a loſs by *capture*; for though the veſſel was captured, yet having afterwards been reſtored, ſhe might have reached her deſtined port, in which caſe the underwriters would have been diſcharged by the terms of the memorandum; that if this had been a policy upon *intereſt*, the averment that the ſhip was loſt by capture would have been good; becauſe, in that caſe, the inſured might have *abandoned*: But this being a wager policy, and the event inſured againſt being the non-arrival of the ſhip at *Marſeilles*, the inſured could not abandon (*a*).—Mr. Juſtice *Buller*, who tried the cauſe, being of this opinion, nonſuited the plaintiffs.—Upon a motion to ſet aſide this

(*a*) Vid. *Fitzgerald* v. *Pole*, 5 *Bro.* Parl. Ca. 131. ſup. 584.

nonſuit,

nonsuit, it was contended, on the part of the plaintiffs, that the object of the voyage was defeated by the capture; that the moment the voyage was defeated, the insurers became liable, and after that, it was immaterial what course the ship took.—But the court adopted the same opinion upon which Mr. Justice *Buller* had nonsuited the plaintiffs, and held that this could not be averred to be a loss by *capture*; because, after the capture, the ship might still have proceeded to *Marseilles*, which was the event insured.

Nesbitt v. *Lushington*, 4 T. R. 723, sup. 147, 436.

If rioters board a ship and occasion a *stranding*, the loss cannot be recovered on a count for *detention of people*, or for a loss by *pirates*, but only upon a count for a loss by *stranding*.

So, if a mob of rioters board a ship, for the purpose of obliging the captain to sell a cargo of corn at an inferior price, and in consequence of this boarding, the ship be stranded, and a quantity of the corn lost; this is a loss by *stranding*, within the usual memorandum, and, in an action on a policy on the corn, it must be so laid in the declaration; nor could the insured recover in this case, upon a count for a loss by *detention of people*; because this mob did not constitute *a people* within the meaning of the policy: Neither could the insured recover for a loss by *pirates*; because, this being a policy on *corn*, the insurer was liable for no partial loss, unless it were a *general average*, or the ship were stranded; and this was not a general average, because the whole adventure was never in jeopardy; for the persons who took the corn intended no injury to the ship, or any part of the cargo but the corn.

Matthie and others v. *Potts*, 3 *Bos. & Pul.* 23.

British goods are seized in an attempt to run them into the *Spanish* main, as being contraband.—The insured cannot, in this case, declare as for a loss by capture *jure belli*.

So where goods were insured on board a *Spanish* ship, from *Nassau* to *Campeachy*.—The ship, having a licence from the *British* governor at *Nassau*, sailed for *Campeachy* in the *Spanish* main; and having arrived off that port, made signals for launches to come out, (as is usual in this contraband trade), into which the goods insured were put, for the purpose of being run on shore. In the attempt the goods were seized by two *Spanish* government brigs.—In an action on the policy, the declaration stated, 'That, before the goods were discharged or safely 'landed, they were, in a hostile and forcible manner, 'seized, captured, and carried away by persons, then be- 'ing at war with our lord the king, to the plaintiffs un- 'known.'

'known.'—It was objected at the trial that this averment was not supported by the evidence. But Lord *Alvanley*, who tried the cauſe, over-ruled the objection, and the plaintiffs had a verdict.—The court, however, upon motion, ſet the verdict aſide. Mr. Juſtice *Chambre* ſaid, he had no heſitation in ſaying, that, in his opinion, the plaintiffs ought to have been nonſuited, becauſe the evidence produced did not ſupport the averment of loſs in the declaration.

If a loſs happen in conſequence of the captain's miſtak, this cannot be declared upon, as for a loſs by the perils of the ſea.

The cauſe of the loſs muſt be ſtated according to the truth of the caſe. The defendant has a right to inſiſt upon this, in order that he may have an opportunity of demurring, or moving in arreſt of judgment, if it be not ſufficiently averred. If, therefore, a loſs happen in conſequence of the captain's miſtaking his courſe; and, in the declaration, it be alleged that it aroſe from *the perils of the ſea, contrary winds, and other misfortunes*, the plaintiff cannot recover.

Gregſon v. *Gilbert*, B. R. 23 *G.* III. *Park* 62.

The captain of a ſlave ſhip miſtakes his courſe, whereby a ſcarcity of water enſues, and a number of the ſlaves are thrown overboard to ſave the reſt: It is not ſufficient to ſtate in the declaration that, *by contrary winds, currents*, &c, the ſhip was retarded, and the ſlaves periſhed for want of water.

Thus: In a declaration on a policy *on ſlaves* it was ſtated, —'That, by the *perils of the ſea, contrary winds, currents, and other misfortunes*, the voyage was ſo much retarded, 'that a ſufficient quantity of water did not remain for the 'ſupport of the ſlaves and other people on board, and that 'a certain number of the ſlaves *periſhed for want of water*.' —Upon the trial it appeared that the ſhip, being bound from *Guinea* to *Jamaica*, had miſſed the iſland, and that the crew were reduced to great diſtreſs for want of water; that the captain conſulted with the crew, and it was unanimouſly agreed upon, that ſome of the ſlaves ſhould be thrown overboard, in order to preſerve the reſt; and that, at the time this reſolution was formed, there remained but one day's full allowance of water at two quarts *per* man (*a*). The jury, upon this evidence, found a verdict for

(*a*) It were impoſſible to paſs over the mention of this tranſaction without ſome ſentiment of reprobation. Falſe reaſoning has never been carried to the length of maintaining that human beings, however degraded their condition, could be juſtifiably caſt into the ſea, like ſo many bales of goods, to lighten a ſhip

for the plaintiff, with 30l. a-head for every ſlave thrown overboard.—The court, upon motion, granted a new trial, being of opinion, that the declaration did not ſtate the loſs according to the truth of the caſe.—Lord *Mansfield* ſaid,—" This is a very uncommon caſe, and deſerves further conſideration. There is great weight in the objection, that the loſs is ſtated in the declaration to have ariſen from the *perils of the ſea*, and that the currents, &c. had made the ſhip foul and leaky. Now, does it appear by the evidence that the ſhip was foul or leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place."—Mr. Juſtice *Buller* ſaid,—" The declaration does not, in any part of it, ſtate the loſs which has been the occaſion of this demand; and it would be very miſchievous if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the *miſtake* of the captain; yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportuniry of moving in arreſt of judgment, if it be not ſufficiently alleged. But it would be impoſſible for the defendant, in this caſe, to move in arreſt of judgment; for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment cannot be argued from the facts ſtated on the record; and the declaration in this caſe ſtates the loſs to have happened by the perils of the ſea."

---

a ſhip in a ſtorm. Every thing on board, however precious, ought to be thrown overboard ſooner than the meaneſt ſlave. Some have ſuppoſed that, in a caſe of extreme neceſſity, a part of the crew might be ſacrificed to ſave the reſt, and that the fate of the victim ſhould be determined by lot equally among ſt all. But others, upon juſter principles, maintain, that whoever, under pretence of ſaving the ſhip, ſhould throw any human creature into the ſea, whether by lot or otherwiſe, is guilty of homicide; for no man, in order to ſave his own life, has a right to take away the life of another, who makes no attack on him. Vid. *Puffend.* lib. 2. c. 6. § 3. ff. de reg. jur. 32. *Cic.* off l. 3, c. 23.

But the loſs need not be ſtated in the very words of the policy.

In ſtating the cauſe of the loſs, the beſt way is to alledge it, as nearly as may be, in the words of the policy: As if the loſs be by *barratry*, it ought regularly to be ſtated to have been occaſioned "*by the barratry of the maſter and* "*mariners.*" But it will be ſufficient if it be ſtated in words which import the ſame thing.

Knight v. *Cambridge*, 2 Ld. *Ray.* 1349; 1 Str. 581. 3 *Mod.* 230, ſup. 443.

If it be alleged that the loſs happened by the *fraud and negligence* of the maſter; this is a ſufficient allegation of *barratry*.

Thus, where it was alledged, that, *per fraudem et negligentiam magiſtri, navis prædicta depreſſa et ſubmerſa fuit, et totalitur perdita et amiſſa fuit, et nullius valoris devenit:*— It was objected that this was not within the meaning of the word *barratry*, and that the allegation ſhould have been expreſs, that the ſhip was loſt by the barratry of the maſter; and that, though barratry may import *fraud*, yet it does not import *neglect*.—But the court were unanimouſly of opinion that there was no occaſion to aver the fact *in the very words of the policy*; but if the fact alledged came within the *meaning of the words*, it was ſufficient (*a*).

Where ſalvage is to be recovered, it is ſufficient to ſtate the injury which occaſioned it.

Where ſalvage is to be recovered it is not neceſſary to declare for ſalvage, *eo nomine*. It is ſufficient to ſtate the accident or injury which occaſioned that charge, without ſtating ſpecially the particular circumſtances which led to it.

Carey v. *King*, Ca. Temp. *Hard.* 304.

Thus:—The plaintiff declared, 'that the ſhip 'ſprung a leak and ſunk in the river, whereby the goods 'inſured were ſpoiled:'—The evidence was, that ſome of the goods were ſpoiled, and ſome ſaved; and the queſtion was, whether the plaintiff might give in evidence

(*a*) The particular manner in which the loſs in that caſe was occaſioned does not appear in any of the printed reports of it. But in a MS. note of the arguments of *Stamma* v. *Brown*, taken by Mr. *Ford*, (cited by Lord *Ellenborough* in *Earle* v. *Rowcroft*, 8 *Eaſt* 135.) the caſe of *Knight* v. *Cambridge* is cited to ſhew that "*if the maſter ſail out of the port without paying the port duties, whereby the goods are forfeited, loſt, or ſpoiled,*" *that is barratry*; and Lord C. J. *Lee*, in the ſame caſe of *Stamma* v. *Brown*, 2 *Str.* 1174, compared it to the caſe of a *ſailing out of port, without paying the duties, whereby the ſhip was ſubjected to forfeiture*, which, he ſaid, had been holden to be barratry; probably alluding to *Knight* v. *Cambridge*.

the expence of *ſalvage*, that not being particularly laid in the declaration as a breach of the policy.—Lord *Hardwicke*, C. J. ſaid;—" I think it may be given in evidence; for the inſurance is againſt all accidents. The accident laid in the declaration is, that the ſhip ſunk in the river; it goes on and ſays, that, by reaſon thereof, the goods were ſpoiled, which is the only ſpecial damage laid: Yet it is but the common caſe of a declaration that lays ſpecial damage, when the plaintiff may give evidence of any damage that is within the cauſe of action as laid; and though it was objected that ſuch a breach of the policy ſhould be laid, as that the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient."

Only debt or covenant will lie on the policies of the two inſurance companies.

The two inſurance companies being corporations can do no act but by deed under their common ſeals. Their policies of inſurance, therefore, being under ſeal, no action of *aſſumpſit* will lie upon them, but only debt or covenant.

The 6 *G.* I. c. 18. preſcribes a form of declaring in debt.

By the ſtat. 6 *G.* I. *c.* 18. § 4., each of theſe companies is directed to provide ſuch a ſtock of ready money as ſhall be ſufficient to anſwer all juſt demands upon their policies for any loſſes that may happen, and to pay the ſame from time to time, according to the tenor of their policies: 'And in caſe of refuſal, the inſured may 'bring his action of *debt*, or *on the caſe* (*a*), bill, ſuit, or 'information of the money demanded, againſt the cor-'poration refuſing to pay as aforeſaid, in any of His Ma-'jeſty's courts of record at *Weſtminſter*.—And in ſuch 'action the plaintiff may declare, "*That the ſame cor-*"*poration is indebted to him in the money ſo demanded, and* "*have not paid the ſame according to this act*;" and 'thereupon the plaintiff or plaintiffs ſhall recover againſt 'the ſame corporation double damages beſides full coſts 'of ſuit.'

(*a*) This act muſt have been drawn by ſome perſon very little ſkilled in legal forms. An action *on the caſe* is here given on their policies *under ſeal*; and this is followed by a form of declaring in *debt*.

This laſt clauſe abſurdly ſubjected theſe companies to double damages, beſides coſts, in actions which they could not prevent or avoid, for want of a proviſion in the act to oblige the inſured to make diſcovery of his loſs before action brought. This being found to encourage ſuits for the ſake of double damages was ſoon repealed by a clauſe in a ſubſequent ſtatute. Theſe corporations are now, therefore, only liable to pay their loſſes in the ſame manner as private underwriters (*a*).

The venue may be changed if wrong laid, unleſs it be by deed.

If the venue in the declaration be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made (*b*), unleſs it be by *deed*; in which caſe the court will not change the venue, without ſome ſpecial ground being laid to induce them to depart from the general rule (*c*).

The premium may be recovered back in an action for money had and received.

If the inſured ſeek only to recover back his premium; the proper form of action is *indebitatus aſſumpſit*, for money had and received by the defendant to the uſe of the plaintiff.

Sect. III.

Of the Plea, and bringing Money into Court.

In what caſes the general iſſue is the proper plea.

THE moſt uſual plea to an action on a policy of inſurance is the general iſſue, *non aſſumpſit*; which not only puts in iſſue every fact alledged in the declaration, but alſo enables the defendant to give in evidence any matter that goes to diſaffirm the contract, or to diſcharge the plaintiff's demand under it (*d*).—If, therefore, the defendant would diſpute the legality or the validity of the policy; if he would deny the intereſt of the inſured, and ſhew the policy to have been a wagering one; if he would prove that the inſured has been

---

(*a*) Vid. ſtat. 8 *G.* I., ch. 30, § 25.— (*b*) And. 66, 2 Str. 1180, Say. Rep. 7, 2 T. R. 275.— (*c*) 1 T. R. 781.— (*d*) *Doug.* 106, 7. Vid. *Bul.* N. P. 152. *Penſon* v. *Lee*, 2 *Boſ.* & *Pul.* 330, ſup. 655.

guilty

guilty of miſrepreſentation, concealment, or any other fraud; that the ſhip was not ſea-worthy; that the voyage inſured was not the voyage intended; that the ſhip ſailed on a different voyage from that deſcribed in the policy; that there had been a deviation; that no loſs, or at leaſt not to the amount claimed by the plaintiff, had happened, —the general iſſue is the proper plea (*a*).

Though the compliance with every warranty expreſſed in the policy, or implied in the contract, is an affirmative which it is incumbent on the plaintiff to prove; yet, in anſwer to the general evidence from which ſuch compliance is uſually preſumed, the defendant may, under the general iſſue, give expreſs evidence of a non compliance: As, that the ſhip did not ſail with convoy; that ſhe never obtained ſailing inſtructions, or had unneceſſarily quitted the convoy; that ſhe was enemy's property, though warranted neutral; that ſhe had forfeited her neutrality, &c.

Under the general iſſue, the defendant may ſhew non-performance of a warranty

(*a*) In the caſe of *Goram* v. *Sweeting* (2 *Saund* 205), the defendant, to a declaration for a total loſs by the perils of the ſea, pleaded that the ſhip arrived ſafe; "*abſque hoc*, that "the ſhip, her tackle, apparel, and furniture, were ſunk in the "ſea *and* loſt."—Upon demurrer to this plea, it was objected that the traverſe being in the conjunctive, if iſſue had been taken on it, and ſo much as an anchor or cable had been ſaved, the defendant would have been entitled to a verdict, though every thing elſe had been loſt.—The court gave judgment for the plaintiff.—*Saunders*, who was counſel for the defendant, and probably drew the plea, concludes his report in much diſpleaſure at the judgment of the court, who, he ſays, *decided without much conſideration, or well underſtanding the caſe.* The plea was one of thoſe artful expedients to gain an unfair advantage, in which the bar, in *Saunders*'s time, and, indeed, *Saunders* himſelf, were but too fertile. Special pleas, *in aſſumpſit*, to avoid or diſaffirm the contract, or diſcharge the plaintiff's demand under it, are now quite exploded. The plea of *non aſſumpſit* which puts in iſſue every material allegation in the declaration, and under which the defendant may prove whatever ſhews that, *ex equo et bono*, the plaintiff has no right to recover, is now the only plea ever pleaded in actions on policies of inſurance, which are meant to be tried upon the merits only.

Or that the insurance was double.

So the defendant may ſhew that it was a double inſurance, and that the plaintiff had already recovered to the amount of his intereſt againſt the underwriters in another policy, to whom the defendant has made contribution (*a*).

By ſtat. 19 G. II. c 37. the inſured muſt diſcloſe how much he has inſured in the whole.

To enable the defendant to diſcover whether there be a double inſurance in any caſe, he may, under the ſtat. 19 *G.* II., c. 37. § 6, call upon the plaintiff to declare in writing, within 15 days, what ſum he has inſured in the whole, and how much he has borrowed on bottomry or reſpondentia, for the voyage in queſtion or any part of it (*b*).—It is a little ſingular, however, that this act provides no means of compelling the plaintiff to deliver this declaration, nor any puniſhment for delivering a falſe one. The court would, probably, after the expiration of the 15 days, ſtay the proceedings till a ſatisfactory declaration were delivered. An action would, perhaps, lie at the ſuit of the inſurer againſt the inſured, either for refuſing to make ſuch declaration, or for delivering a falſe one (*c*).

When the defendant may plead a tender.

Where the queſtion between the parties is, not whether the underwriters be liable to pay any thing to the inſured, but only *how much* they ſhall pay, it will be adviſable for them to *tender*, before any action brought, the ſum which, under all the circumſtances, they conceive to be fully ſufficient to ſatisfy every fair claim of the inſured. When ſuch tender has been made and rejected, it may be pleaded, with non-aſſumpſit as to the reſidue of the plaintiff's demand.—The plaintiff, by his replication, may either deny the tender; or confeſs it, and join iſſue on the plea of *non aſſumpſit* as to the reſidue, and upon that iſſue proceed to trial for further damages.

When he ſhall bring money into court.

When the underwriter in ſuch caſe, has omitted to make a tender before proceſs has been ſued out againſt him, he ſhould *bring the money into court* (*d*).—Before the ſtat. 19 *G.* II.

(*a*) Vid. ſup. ch. 4. § 4.——(*b*) Vid. ſup. 129.——(*c*) Vid. 2 Inſt. 74, 104. F. N. B. 161.——(*d*) Vid. ſup. ch. 15, § 1.

c. 37, it would ſeem that this was not permitted in actions on policies of inſurance: and yet, in *aſſumpſit*, and covenant for the payment of money, and in debt alſo, even where the plaintiff might have recovered leſs than the ſum demanded, this practice had been allowed long before (*a*). But by this act (§ 7.) it is provided, 'That in debt, 'covenant, or any other action on any policy of inſu-'rance, the defendant may bring into court any ſum or 'ſums of money; and if the plaintiff ſhall refuſe to ac-'cept the ſame, with coſts to be taxed, in full diſcharge 'of ſuch action; and ſhall afterwards proceed to trial, 'and the jury ſhall not aſſeſs damages exceeding the mo-'ney brought into court; the plaintiff ſhall pay the de-'fendant in ſuch action, the coſts to be taxed.'

Whether *alien enemy* ought to be pleaded, or given in evidence under the general iſſue.

It has been already ſhewn that an inſurance on the property of an *alien enemy* is void; and that no action can be maintained on any ſuch inſurance, either at his own ſuit, or on his behalf (*b*). If, therefore, an action on a policy be meant to be defended on that ground, it may be ſpecially pleaded in bar, being matter of law, which does not go to the giſt of the action, but only to the *diſcharge* of it (*c*).

The two inſurance companies may, to *debt*, plead *nil debet*, and to covenant, *non infregit conventionem*; and the jury may give the whole, or ſuch part of the ſum inſured as the plaintiff is entitled to recover.

As to the two inſurance companies, though the clauſe of the ſtat. 6 *G.* I. c. 13. § 4. which gave double damages againſt them, was repealed by the ſtat. 8 *G.* I. c. 30. § 25.; yet the form of the policy remained, and it was ſtill neceſſary to ſue them either in debt or covenant; from whence this inconvenience aroſe, that theſe companies, when ſued, were obliged to plead ſpecially (*d*); becauſe the general iſſue, *non eſt factum*, only puts

(*a*) 5 Mod. 212. 1 *Vent.* 356. 2 *Salk.* 596, 7. 1 Lord *Ray.* 255.—— (*b*) Vid. ſup. ch. 2. § 1——(*c*) In the caſe of *Brandon* v. *Neſbitt*, 6 T. R. 23, ſup. 38, it was pleaded; but in *Briſtow* v. *Towers*, 6 T. R. 35, ſup. 39, the defendant pleaded the general iſſue, and the fact was found by the ſpecial verdict. ——(*d*) If the form of declaring mentioned in the ſtat. 6 *G* I. c. 18. § 4. (which does not mention or even refer to the policy) had been adopted in actions againſt theſe companies, the inconveniencies

puts in iſſue the exiſtence of the inſtrument upon which the plaintiff declares (*a*). The conſequence muſt have been, that the parties were often entangled in the intricacies of pleading; and even when an iſſue was at length joined, it frequently happened that the whole merits could not come in queſtion, and the jury were obliged to find a verdict for the whole ſum inſured, though in juſtice only a ſmall part of it was due. This drove the defendants to ſeek relief in courts of equity, when the matter in queſtion might as well have been determined at once by the jury, in like manner as in the caſe of private inſurers (*b*).—To remedy this inconvenience, the ſtat. 11 *G.* I. ch. 30. § 43. provides,—'That in all actions of debt 'againſt either of the ſaid corporations, upon any poli-'cies of inſurance under their common ſeal, it ſhall be 'lawful for them to plead generally *that they owed nothing* 'to the plaintiff in ſuch action; and in actions of co-'venant upon ſuch policies to plead generally, *that they* '*have not broke the covenants* in ſuch policy contained, or 'any of them. And if iſſue be joined thereupon, it ſhall 'be lawful for the jury, if they ſee cauſe, to find a 'verdict for the plaintiff, and to give ſuch part only of 'the ſum demanded, if in debt, or ſo much damages, 'if in covenant, as it ſhall appear to them, upon the 'evidence, ſuch plaintiff ought in juſtice to have,'

---

conveniences here enumerated might have been avoided; becauſe, to ſuch a declaration the defendant might have pleaded *nil debet*, and upon that plea the parties might have gone to trial upon the merits, whatever thoſe merits might have been, in like manner as upon the general iſſue in an action of *aſſumpſit* upon a common policy. But, unfortunately, plaintiffs were not *compelled* by the ſtatute to adopt the form of declaration therein given; and they, or at leaſt their attornies, were too much intereſted to purſue a different courſe.

(*a*) 5 Co. 119.——(*b*) Vid. recital to the ſtat. 11 *G.* I. c. 30. § 43.

Sect. IV.

Of the Conſolidation Rule.

The neceſſity of conſolidating actions on policies of inſurance.

WE have already ſeen that the underwriters on common policies only bind themſelves *ſeverally*, that is, each for the amount of his own ſubſcription, and not jointly; becauſe it would be impoſſible to find any number of underwriters who would be willing to bind themſelves for each other, as they muſt do if the contract were *joint*; and, indeed, ſince the eſtabliſhent of the inſurance companies, ſuch a policy would be void by the ſtat. 6 G. I. c. 18. (*a*). Hence the inſured, even if he were ſo diſpoſed, cannot bring a joint action againſt all the underwriters on a common policy, but muſt ſeek his remedy by a ſeparate action againſt each. This, though it neceſſarily reſults from the form of the contract, was a ſubject of complaint ſo long ago as the time of Queen *Elizabeth* (*b*); and it cannot be denied that it enabled the inſured, if his demand were diſputed or delayed, to proceed to trial in all the actions, however ſmall his demand might be againſt each underwriter, and thus ſubject each to the entire coſts of an action. They therefore often found it to be the wiſer policy, rather to ſubmit to an unjuſt demand, than ſubject themſelves to ſuch heavy charges. Sometimes, indeed, they ſought relief in courts of equity, which granted injunctions to ſtay the proceedings in all the actions but one, the defendants in the reſt undertaking to pay, according to their ſubſcriptions, if the plaintiff ſhould recover in that one.

This was formerly done by courts of equity.

This being found to be very inconvenient, and little leſs expenſive than the oppreſſive proceeding againſt which the underwriters ſought relief, an attempt was at length made

Firſt attempt to do this in a court of law.

(*a*) Sup. 46.——(*b*) Vid. the preamble to ſtat. 43 *Eliz.* c. 12, ſup. 25.

by

by Mr. Serjeant *Eyres*, in the year 1731, in a caſe where 28 actions had been brought on a policy, to ſtay the proceedings in all but one, the defendants in the reſt entering into a rule of court that thoſe cauſes ſhould abide the event of that one. But the plaintiff refuſing to give up his advantage, and conſent to ſuch a rule, the court declared they could do nothing in it (*a*).—It has been ſaid (*b*) that 'Mr. Juſtice *Deniſon* intimated, that if the plaintiff perſiſted, againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there ſhould be an opportunity of trying that one action; that Lord *Mansfield* then ſtated the great advantage reſulting to each party by conſenting to the application which was made; and added, that if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, or to bring any writ of error, and ſhould produce all books and papers that were material to the point in iſſue; and that this rule was afterwards conſented to by the plaintiff."—It is not preciſely ſtated when, or upon what occaſion, this paſſed. From the manner in which it is introduced, it would ſeem as if it had paſſed in the above caſe of —— v. *Glover* But neither Mr. Juſtice *Deniſon* or Lord *Mansfield* was a judge till many years after that caſe. It is extremely probable that after Lord *Mansfield* came to preſide in the court of King's Bench, he and Mr. Juſtice *Deniſon* did, upon ſome occaſion, expreſs ſentiments ſimilar to thoſe aſcribed to them; becauſe it is well known that Lord *Mansfield*, ſoon after his coming into that court firſt eſtabliſhed the conſolidation rule, and ſettled the practice upon it in its preſent form. It is ſingular, however, that Sir *James Burrow*, who has reported the deciſions of the court of King's Bench for many years after Lord *Mansfield* came to preſide there, has publiſhed no report of the caſe in which ſo important an alteration of the practice firſt took place.

(*a*) Vid. —— v. *Glover*, Hil. 5 *G.* II. 2 *Barnardiſt.* 103. —(*b*) *Park* introd. p. 50.

The nature of the rule, and the terms on which it is uſually made.

Be this as it may, it is now the conſtant practice, where a number of actions are brought upon the ſame policy, to conſolidate them by a rule of court, or by a judge's order, which reſtrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one. But this is done upon condition that the defendant ſhall not file any bill in equity, or bring any writ of error, for delay.

Mutual admiſſions.

But beſides theſe, the court, upon a proper ground being made by the plaintiff, will impoſe any other terms upon the defendants, which, under all the circumſtances, appear reaſonable: As, that they ſhall produce, at the trial, all books, papers, &c. in their cuſtody, material to the point in iſſue; that the defendant in the action to be tried ſhall admit his ſubſcription to the policy, the intereſt of the inſured, the loſs, or any other fact, upon which the queſtion intended to be tried does not turn, or which is not meant to be ſeriouſly diſputed. But the court will not impoſe any terms on the defendant out of the ordinary courſe, without his conſent, which, however, a defendant, who only means to litigate fairly and honorably, will never refuſe, when it is only to ſave the trouble and expence of proving facts which are not diſputed. On the other hand, the court, in conſideration of theſe unuſual conceſſions, will impoſe any reaſonable counter-terms on the plaintiff, which the defendant may have to propoſe.

It is never made a part of the rule that the plaintiff may try the other cauſes if he pleaſe.

It is no part of the conſolidation rule that the plaintiff ſhall be at liberty to try the other cauſes if he pleaſe. Such a liberty would defeat the end propoſed by the conſolidation rule; and, therefore, if the plaintiff will not conſent to the rule without this term, the court will grant imparlances in all the cauſes but one, till he conſent (*a*).

Benefit reſulting from this rule.

Thus has a practice, which was often attended with ruinous conſequences to the one party or the other, at length, by the wiſdom of the judges, been converted into an effectual means of obtaining ſubſtantial juſtice for

(*a*) Per Cur. *Brown* v. *Newnham*, E. 25 G. III. B. R. MS.

both

both, at a moderate expence, in cases where the obstinacy or dishonesty of plaintiffs might, before this regulation took place, have rendered that almost impossible.—On the one hand, the court may stay the plaintiff's proceedings for any length of time, if, through perverseness, or the cunning of interested or illiberal advisers, he refuse his consent to consolidate the actions upon proper terms: If, on the other, the defendants will not accede to such terms, the court, to punish them, may permit all the actions to proceed.

All the defendants are bound by the verdict in the cause tried.

But though, by the rule, the defendants undertake to be bound by a verdict in the action which is to be tried, yet this must be understood to mean such a verdict as ought to stand, as a final determination of the cause. It is certainly very beneficial to the parties that there should be but one trial for all the underwriters on the policy; but then that trial should be a satisfactory one (*a*). And therefore, if the plaintiff obtain a verdict, but the defendant apply for and obtain a new trial, the other defendants shall not be obliged to pay their money till the ultimate decision of the cause in favour of the plaintiff (*b*). And in cases of insurance, therefore, the courts should, in general, be less strict, and sometimes grant new trials upon less decisive grounds than in other cases. Sometimes, indeed, the insured, where he is not aware of the nature of the defence that is meant to be set up by the underwriters, or where there is a very doubtful or difficult question to be tried, will not agree to consolidate; but will proceed to trial in one cause at a time, reserving to himself the power of bringing his case again and again under discussion, so long as he has any hope of success.

If an attorney sue out a writ of error, though for manifest error, this will be a breach of the rule.

By the terms of the consolidation rule, the defendants are bound *generally* not to bring *any writ of error*; the meaning of which is, that, after a fair trial, and substantial justice has been done, no writ of error shall be brought, though manifest error appear on the face of the record. For even then, the writ of error being against the justice

(*a*) Per Lord *Mansfield*, 1 *Bl.* 464.—(*b*) R. *Hodgson* v. *Richardson*, 3 *Bur.* 1477.

of

of the caſe, the court will hold the party ſtrictly to the terms of the rule by which the plaintiff has been prevented from proceeding in the ordinary courſe of law. If, therefore, under ſuch circumſtances, the defendant's attorney bring a writ of error, the court will grant an attachment againſt him for his contempt in ſuch a breach of the rule (*a*).

Sect. V.

Of the Trial.

Proof of the plaintiff's caſe.

IF the parties proceed to trial upon the general iſſue, which moſt frequently happens, the plaintiff, as has been already obſerved, muſt, as in all other caſes, begin by proving every material allegation contained in his declaration.—If any of the facts of the caſe, on either ſide, have been agreed to be admitted, theſe admiſſions are reduced into writing and ſigned by the attornies on both ſides, and being read, they ſupply the place of actual proof.

The neceſſity of mutual admiſſions.

In every litigation upon commercial ſubjects, and particularly in matters of inſurance, it is highly proper, nay in ſome caſes abſolutely neceſſary, that the parties ſhould mutually admit every fact that is not meant to be ſeriouſly diſputed, in order that the caſe may be put upon its true merits with as little expence, vexation, or delay as poſſible. Commercial liberality and profeſſional honour both equally require that this ſpecies of candour ſhould be carried as far as the fair and juſt pretenſions of the parties will admit. Nothing can more conduce to the ends of juſtice, nothing can more exalt our national character, or promote the true intereſts of commerce, than ſuch mutual conceſſions.

The rules of evidence are, in general, the ſame in trials upon policies of inſurance as in other caſes. There

(*a*) R. *Camden* v. *Edie*, 1 *H. Bl.* 21.

are

are only three caſes to be found in our books upon points of evidence which may be thought peculiar to inſurance. The firſt is a very ſhort note, in which it is ſaid to have been determined, that in an action on a policy of inſurance, any who have inſured upon the ſame ſhip cannot be witneſſes.—Mr. Juſtice *Buller*, from whoſe book the above note is cited, in delivering his judgment in the following caſe of *Bent* v. *Baker*, ſays, that he took great pains, but without ſucceſs, to get the real ſtatement of that caſe, thinking that it might have been determined on its own particular circumſtances. "However," ſays he, "in conſequence of that determination, judges at *niſi prius* have frequently rejected underwriters as witneſſes. Nor is it extraordinary that, at *niſi prius*, they ſhould have been guided by the only caſe upon the ſubject, without much examination into the grounds of it."

Ridout v. *Johnſon*, E. 11 *An. Bul.* N P. 283.

In general, an underwriter cannot be a witneſs in an action on a policy.

Bent v. *Baker*, 3 T R. 27.

But if the broker who effects a policy, ſubſcribe it himſelf, after the other underwriters have ſubſcribed it;—he may be a witneſs for the other underwriters, if they releaſe him from all contribution for coſts, though an action be depending againſt him, and he has joined in a bill in equity againſt the inſured, for a diſcovery.

In the ſecond caſe, which was ſolemnly determined upon great conſideration, one *Bowden*, the broker who had effected the policy, was produced as a witneſs on behalf of the defendant. It appeared that *Bowden* had ſubſcribed the ſame policy immediately after the other underwriters; that an action was then depending againſt him for the ſame loſs; and that he and the other underwriters had filed a bill in equity againſt the inſured for a diſcovery, in order to avoid the policy.—It was objected on the part of the plaintiffs, that he was not a competent witneſs for the defendant. Upon this the defendant produced a releaſe to *Bowden* of all demands for any contribution of coſts both in law and equity, and the coſts of the ſuit in equity were tendered to the plaintiffs, with an undertaking to diſmiſs their bill, which the plaintiffs refuſed.—The witneſs was rejected by Lord *Loughborough*; and the queſtion of his competency coming before the court of King's Bench upon a bill of exceptions, it was there determined, that, under the circumſtances, he was a competent witneſs for the defendant, and that his teſtimony ought to have been received.—Lord *Kenyon* founded his opinion on the ground that the witneſs was not intereſted.—Mr. Juſtice *Aſhurſt* thought that, as he had acted as broker, he could not afterwards, by ſubſcribing the policy, or by

any

any other act of his own, deprive either party of his teſtimony.—Mr. Juſtice *Buller* was of opinion, that if the witneſs was competent to anſwer *any* queſtion, he ought not to have been rejected *generally*; and that, on the principle of neceſſity alone, he ought to have been received; as he might be the only perſon who, from the nature of the thing, could ſpeak to a repreſentation, for inſtance, made by himſelf to the underwriters.

This caſe affords a ſufficient proof, that brokers and others, who act as agents, either for the inſured or the inſurers, ought never to be underwriters (*a*).

De Symonds v. *De La Cour*, 2 New Rep. 374.

In an action on a policy on goods, the captain, who is a part owner of the ſhip, is a competent witneſs to prove that the port of deſtination in the policy was the true deſtination of the ſhip; but not to prove that a deviation was juſtified by neceſſity.

The laſt of theſe caſes was a policy on goods from *London* to *Emden*; and it appeared that the ſhip, meeting with difficulties in her voyage, put into the *Texel*, where ſhe was ſeized by the *Dutch*.—The defence ſet up was, that the goods were originally deſtined for the *Texel*, and not for *Emden*.—To prove that *Emden* was the real deſtination of the ſhip, and that ſhe ſailed for that place by the direction of the owners of the goods, the plaintiffs called the captain, who was a part owner of the ſhip.—It was objected, that he was not a competent witneſs. But Sir *James Mansfield*, Chief Juſtice, who tried the cauſe, overruled the objection, and the plaintiffs had a verdict.—In ſupport of an application to the court to ſet this verdict aſide, it was contended, that, as the ſhip had deviated from the voyage inſured, the plaintiffs were bound to ſhew that ſhe was driven into the *Texel* by neceſſity; but that, if ſhe deviated without neceſſity, the owners of the ſhip were anſwerable to the owners of the goods, and conſequently, the captain, being a part owner, had a direct intereſt.—But the court held, that he was a competent witneſs to prove that, by the direction of the owners of the goods, the ſhip originally ſailed on the voyage inſured, though not to prove that the deviation was juſtified by neceſſity.—Mr. Juſtice *Rooke* ſaid, that the ground upon which he concurred in this deciſion was, that as the captain acted as the agent of the owners of the goods, and with their knowledge, they could have no action

(*a*) Vid. ſup. 301.

againſt him, as had been alleged on the part of the defendant.

The evidence generally adduced on the part of the plaintiff is reducible to the following heads:

1. *Proof of the contract;*
2. ——— *payment of the premium;*
3. ——— *the intereſt of the inſured;*
4. ——— *compliance with warranties;*
5. ——— *the loſs.*

1. *Proof of the Contract.*

The policy being proved, is concluſive evidence of the contract; and no parol evidence can be received to vary the terms of it.

The firſt ſtep on the part of the plaintiff is to prove the contract, which is done by producing the policy and proving the defendant's ſubſcription to it. This, if there be no variance, is concluſive evidence of the contract ſtated in the declaration; and the general rule is, that no evidence can be received of any parol ſtipulation or agreement to alter, control, or qualify it (*a*).

Kaines v. *Knightly*, *Skin.* 454.

A parole agreement that the riſk ſhould begin at a place different from that inſerted in the policy, cannot be received in evidence.

As, where an inſurance was made "from *Archangel* to "*Leghorn*;" and upon a trial at bar, the defendant endeavoured to ſet up a parol agreement, made before the ſubſcription, that the adventure ſhould only begin from the *Downs*:—It was objected, that unleſs ſuch agreement be put in writing, it ſhall be taken that the policy ſpeaks the minds of the parties; and to ſuffer policies to be defeated by agreements not in writing, would be to leſſen their credit, and render them of no value.—Lord C. J. *Pemberton* ſaid, that policies were ſacred things; and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to ſay that it was agreed to be upon a condition, &c.

(*a*) Yet ſee the caſe of *Bates* v. *Grabham*, *Salk*, 444. ſup. 344. and the other authorities cited in ch. 8. § 4.

when

when the bill may have been negociated: For though neither of them is a ſpecialty, yet they are of great credit, and much for the ſupport, convenience, and advantage of trade.—The jury, however, found contrary to the direction of the court. But this verdict was ſet aſide; and upon another trial at bar, the next term, there was a verdict for the plaintiff, according to the direction of the court.

Witneſſes may be examined, however, to prove an *uſage*, as explanatory of a clauſe in a policy; but their *opinion* of its meaning is not admiſſible evidence (*a*). Queſtions of conſtruction are queſtions of law, which the judges only are competent to determine; and the opinion of no other perſon, whatever may be his ability or experience, can ever be looked upon as of authority in our courts, or received in evidence before a jury.

Witneſſes may prove an *uſage* as explanatory of a clauſe in the policy: but their *opinions* are not admiſſible.

With reſpect to *uſage*, it is a ſort of natural law, formed out of our habits, our intereſts, and the univerſal conſent of mankind. In all maritime affairs, it is regarded as the ſureſt interpreter of the law. There the maxim, *Optima eſt legum interpres conſuetudo*, particularly applies. In queſtions of inſurance, eſtabliſhed uſages muſt in all caſes be adhered to; and in doubtful caſes, they are the ſafeſt guide we can follow. If the uſage of trade in any inſtance be not ſufficiently known or rightly underſtood, it is adviſable to conſult the moſt experienced merchants. Still, however, the force of uſage is not to deſtroy the law. Uſage is to be conſulted only where the law is doubtful. Where the law is clear, it muſt prevail. The law is permanent; but uſages ſometimes change, and often diſappear with the circumſtances which gave them birth.

How far the *uſage of trade* ought to be regarded.

Policies are often ſubſcribed by an agent in the name of the underwriter, and in ſtrictneſs, the procuration or authority of the agent, thus to ſubſcribe for his principal, ought to be proved. Few defendants, however, would

How procuration ſhall be proved.

(*a*) Per Lord *Manſfield*, in *Lyons* v. *Bridge*, *Doug.* 512. Vid. alſo Lord *Manſfield's* judgment in *Carter* v. *Beehm*, ſup. 479.

ever think of availing themſelves of the want of ſuch proof in an action which ought never to be tried but upon ſome point fairly diſputable. An inſtance, however, occurs where the attempt was made.

Neale v. *Erving*, 1 *Eſp.* Rep. 61.

In an action on a policy, the broker was called to prove the ſubſcription. He ſaid that the defendant's name had been ſubſcribed by one *Hutchins*; he did not know by what authority, but that *Hutchins* was in the conſtant habit of ſubſcribing policies in the defendant's name, and had done ſeveral for him and for others to his knowledge.---It was objected that *Hutchins* might have done this by a power of attorney, which might have been limited, or for a particular purpoſe; and therefore ſhould have been ſhewn, that it might appear that *Hutchins* was properly authoriſed.---But Lord *Kenyon* over-ruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authoriſed; and his having ſubſcribed ſeveral policies in the defendant's name, was ſufficient evidence of that authority to charge the defendant: That if *Hutchins* was only a particular agent for the defendant, it lay on him to ſhew it, not the plaintiff.

2. *Proof of Payment of the Premium.*

Proof of the policy is proof of the payment of the premium.

Every policy contains a clauſe by which the underwriters confeſs the receipt of the premium, after the rate of ſo much *per cent.*; and the policy being proved, is therefore evidence of its having been paid.

Policies are, in general, effected by the intervention of brokers, between whom and the underwriters open accounts are uſually kept, in which the brokers make themſelves debtors for all premiums, and take credit for all loſſes which they are authoriſed to receive from the underwriters; and theſe accounts are ſettled and adjuſted at ſtated periods. In general, therefore, the underwriter looks to the broker only for his premium. It often, indeed, happens that the underwriter knows not who the inſured is; and as he gives the inſured a receipt for the premium upon the face of the policy, it muſt be ſuppoſed

that, having thus diſcharged him, if the premium be left unpaid, he gives credit only to the broker, and from him only can he recover it (*a*).

3. *Proof of the Intereſt of the Inſured.*

How the intereſt ſhall be proved.

The next thing to be proved is the *intereſt* of the inſured (*b*). This may be done by any documents which are evidence of the property which the inſured has in the ſhip or goods inſured, and of the value of that property; ſuch as bills of ſale, bills of lading, invoices, and proof that the goods were on board (*c*), bills of charges of the out-fit, cuſtom-houſe clearances, &c.; and any deficiency in this ſpecies of proof may be ſupplied by parol evidence. So, if the inſured have exerciſed acts of ownerſhip, by directing the loading, &c. of the ſhip, it has been holden that proof of the payment of the people employed, is ſufficient proof of intereſt in the ſhip (*d*).

Ruſſel v. *Bonſor*, 2 *Str.* 1127.

The rules of evidence in ſuch caſes, where no fraud is ſuſpected, are not very rigidly adhered to:---Therefore where an action was brought upon a policy of inſurance on a cargo of goods purchaſed at *Peterſburgh*; the plaintiff, in order to prove his intereſt, produced a *bill of parcels* from the vendor at *Peterſburgh*, with his receipt to it, and proved his hand-writing. The defendant objected that this was no evidence againſt the underwriters: But Lord C. J. *Lee*, who tried the cauſe, held it to be ſufficient evidence of the plaintiff's intereſt.

A bill of parcels with the vendor's receipt, for goods bought abroad, is ſufficient proof of intereſt.

Upon a general averment of intereſt the inſured may prove any ſpecies of intereſt that is deemed inſurable, in any *aliquot parts* of the thing inſured.

In the ſecond ſection of this chapter (*e*) it has been ſhewn that, in the declaration, the intereſt may be averred either generally or ſpecially; and that, under a general averment of intereſt, the inſured may prove any ſpecies

(*a*) Vid. ſup. 291.——(*b*) As to what ſhall amount to an inſurable intereſt, *vid. ſup.* ch. 4, *paſſim.*——(*c*) Per Lord *Kenyon* in *M'Andrews* v. *Bell*, 1 *Eſp.* Rep. 373. ſup. 469.——(*d*) Per Lord *Kenyon*, at N. P. *Amery* v. *Rogers*, 1 *Eſp.* Rep. 209, ſup. 519.——(*e*) Sup. 682.

of intereſt he may have in the ſhip or goods inſured. It is alſo there ſhewn that it is unneceſſary to ſtate the *quantum* of the intereſt in the declaration; for as the plaintiff in aſſumpſit recovers according to the evidence *pro tanto*, he may under a general averment of intereſt in the entire thing inſured, prove an intereſt in any *aliquot part*, and recover damages for the loſs in proportion to ſuch part.

Upon a *valued policy*, it is only neceſſary to prove *ſome* intereſt.

If the policy be an *open* one, the real value of the plaintiff's intereſt muſt be proved;---if it be a *valued* one, it has been holden that the inſured needs only to prove *ſome* intereſt, to take the caſe out of the ſtat. 19 *G.* II. c. 37; becauſe the underwriter, by ſubſcribing the policy, has admitted the value there ſtated; and if more were required, the agreed valuation would ſignify nothing (*a*).

Yet the value in the policy is only *prima facie* evidence, and may be diſputed.

And yet the value in the policy is only to be taken as *prima facie* evidence of the amount of the intereſt of the inſured. For though this value is admitted by the inſurer; yet, as he admits it upon the mere repreſentation of the inſured, if he find it to be fallacious, and that the ſpecified value was fictitious, and only a cover for a wager, it cannot be ſuppoſed that he is ſo far concluded by his admiſſion, as not to be at liberty to diſqute the value, and ſhew by evidence, that it was meant as a mere evaſion of the act (*b*).

Upon a policy on *goods*, a reſpondentia bond is no evidence of intereſt.

In an action upon a policy *on goods*, the plaintiff cannot give in evidence a *reſpondentia bond*, as proof of *intereſt* in the goods upon which the money was borrowed, though they were of greater value than the ſum inſured; becauſe bottomry and reſpondentia intereſts are always inſured *as ſuch*, and there is no inſtance of an inſurance on reſpondentia under the denomination of goods (*c*).---

In *Eaſt India* voyages the *lender* on bottomry can only inſure the ſum lent, and the borrower the ſurplus value of the goods.

Where money has been lent on reſpondentia on *Eaſt India* voyages, the ſtat. 19 *G.* II. c. 37, § 5, conſiders the

---

(*a*) Per Lord *Mansfield*, in *Lewis* v. *Rucker*, 2 *Bur.* 1171, ſup. 624.——(*b*) Vid. ſup. 288.——(*c*) R. *Glover* v. *Black*, 3 *Bur.* 1394. 1 *Bl.* 399, 405, 422. ſup. 317.

borrower,

borrower as having a right to inſure only for the ſurplus value of the goods, above the money borrowed; and the lender as having a right to inſure for the ſum lent. If either were to inſure for more, it would be a *wager* (*a*).

But the uſage of a particular trade may ſanction a departure from this rule---As where the captain of an *Eaſt Indiaman* made an inſurance on "*goods, ſpecie and* "*effects*" on board; he was permitted, in an action on his policy, to give in evidence of his intereſt, money which he had laid out in the courſe of the voyage, and for which he charged reſpondentia intereſt (*b*).

But the uſage of trade may ſanction a departure from this rule.

It would ſeem, however, that, upon a policy on goods generally, the inſured may be permitted to give in evidence of his intereſt, a mortgage or other ſpecial *lien* (*c*).

An intereſt in goods may be proved by a mortgage or other ſpecial *lien*.

In an action upon a policy on bottomry or reſpondentia ſecurities, evidence of the execution of the bottomry or reſpondentia bond, and of the intereſt of the obligor in the ſhip or goods, is ſufficient proof of intereſt in the inſured; and in ſuch caſe, the obligor himſelf is a competent witneſs to prove his own intereſt in the ſhip or goods on which he borrowed the money (*d*).

The execution of a bottomry bond, and the intereſt of the obligor, are ſufficient proof of intereſt in the obligee; and the obligor may prove his own intereſt.

Upon a policy upon a ſhip, the poſſeſſion of the inſured, as owner, is *primâ facie* evidence of property, until further evidence be rendered neceſſary in ſupport of the title thus made, in conſequence of its being impeached by contrary proof on the other ſide.

Proof of poſſeſſion is *primâ facie* evidence of title to a ſhip.

Therefore, where it was proved by the captain that the inſured were the perſons by whom, as owners, he was appointed and employed; this was holden to be ſufficient evidence of ownerſhip, though it afterwards appeared by his anſwers, on croſs examination, that the ownerſhip

Robertſon and anr. v. *French*, 4 *Eaſt* 130.

(*a*) Per Lord *Mansfield*, ſ. c. 3 *Bur.* 1400.——(*b*) Vid. *Gregory* v. *Chriſtie*, ſup. 272.——(*c*) Semb. *Glover* v. *Black*, 1 *Bl.* 423. ſup. 317.——(*d*) Vid. 1 *Bl.* 396.

was derived to the insured under a bill of sale executed by himself, as attorney to one *L. W.* the former owner. For it did not, on that account, become necessary for the insured to produce that bill of sale, or the ship's register, or to give any further proof of their property; these documents being perfectly consistent with a title in the insured.

Marsh v. *Robinson*, 4 *Esp* Rep. 98.

One of several interests may declare on a policy, and aver himself sole owner—A verbal appointment of the captain is *primâ facie* evidence of own ship—No person can have an insurable interest in a ship, unless he be upon the register.

So, where a ship was insured in the name of "*Elizabeth* "*Marsh* and son," and the son brought an action on the policy in his own name only, and averred in the declaration that he was solely interested; and, to prove this, he called the captain, who swore that he had been employed by the plaintiff who verbally ordered him to take the command, to pay the seamen, and draw bills on him on account of the ship.---It was objected, 1st, that the averment in the declaration did not enable the plaintiff to prove a sole interest in himself; and, 2dly, that the evidence of the captain was not sufficient to establish that fact; as the orders given by the plaintiff might have been given by an agent or broker.---But Mr. Justice *Le Blanc*, who tried the cause, overuled both objections, and held that the acts done by the plaintiff were *primâ facie* evidence of sole ownership, and sufficient to call on the defendant to prove the contrary. The defendant then shewed that at the time when the policy was effected the ship stood registered in the names of *Cummins*, *M'Masters* and Co., and that there was no change in the registry till after the policy was effected.---Mr. Justice *Le Blanc* held this to be conclusive against the plaintiff's title, the stat. 26 *G.* III. c. 60. (Lord *Liverpool*'s act) requiring that, where there is a change of owners, there shall be an indorsement on the certificate, accompanied by the oath of the parties; and that till this is done a purchaser has no insurable interest (*a*).

Though the sentence of a court of prize, sitting in a neutral country, be illegal; yet, if the neutral country acquiesce in it, a

With respect to ships, it has been determined in the

(*a*) Vid. *Camden* v. *Anderson*, sup. 65, 115.

High

High Court of Admiralty (*a*), that a ſentence of condemnation pronounced by a court of prize, ſitting in a neutral country, was illegal; and that a ſale under ſuch ſentence would not transfer the property to a neutral vendee.—This deciſion, and the reaſons upon which it was founded, were afterwards recogniſed in the court of King's Bench, where it was holden that a condemnation by a *French* conſul at *Bergen* in *Norway* had not the effect of diveſting the property of a captured ſhip out of the original owner (*b*). Since then Lord *Kenyon*, in a caſe at *niſi prius*, ſaid that, though he approved of that deciſion, yet where the neutral country acquieſced, and permitted the court of prize of a foreign belligerent to exerciſe its functions there, it varied the caſe; and that a *Britiſh* ſubject might derive a title to a ſhip under a ſentence pronounced by ſuch court (*c*).—But it is not eaſy to diſcover a good ground of diſtinction between theſe caſes.

title to a ſhip may be derived under its ſentence.

4. *Proof of Compliance with Warranties.*

Every material averment in the declaration muſt be proved. One of the moſt material is that of the truth of ſuch affirmative warranties, and the peformance of ſuch executory ones, as are contained in the policy; ſuch as, that the ſhip or goods inſured were neutral property; that the ſhip ſailed within the time limited by the policy; that ſhe departed with convoy; that ſhe was of the force warranted; that ſhe was manned with the ſtipulated complement of men, &c.—Such averments muſt be ſtrictly and literally proved; for theſe warranties being in nature of conditions precedent, the compliance with them is an eſſential part of the plaintiff's title; and a non-compliance with any warranty contained in the po-

The truth of affirmative, and the performance of executory, warranties, muſt be ſtrictly and literally proved.

(*a*) Vid. Caſe of the *Flad, Owen*, 1 *Rob.* Adm. Rep. 135, ſup. 389.——(*b*) Vid. *Havilock* v. *Rockwood*, 8 T. R. 268, ſup. 596.——(*c*) Vid. *Smith* v. *Surridge*, 4 *Eſp.* Rep. 25.

licy,

licy, to whatever cauſe this may be imputable, and whatever may have been the cauſe of the loſs, deprives the inſured of all claim to the indemnity meant to be ſecured to him by the contract.

Proof of neutral property.

In the caſe of a warranty that the thing inſured is *neutral property*, it is uſual at the trial to give general evidence of the truth of that warranty; and leave it to the defendant to falſify it, or prove a breach or forfeiture of it. The evidence adduced by the defendant, for this purpoſe, is uſually a ſentence of condemnation as prize by one of the belligerent powers, either on the ground of the thing inſured having originally been enemy's property, or becauſe the ſhip, by ſome miſconduct, had forfeited her neutrality. Copies of the ſentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed ſufficient evidence of the fact of condemnation, and of the grounds upon which it proceeded (*a*).

5. *Proof of the Loſs.*

The true cauſe of the loſs muſt be ſet forth in the declaration.

The accident or misfortune which was the cauſe of the loſs muſt, as we have already ſeen (*b*), be diſtinctly and explicitly ſet forth in the declaration, in order that the inſurer may have notice of the caſe againſt which he is to prepare his defence.

The loſs muſt be proved to have happened during the continuance of the riſk.

To charge the inſurer, the loſs muſt appear to have happened during the continuance of the riſk; and caſes have frequently occurred in which this was the principal queſtion. What ſhall be the commencement and duration of the riſk has been already fully treated (*c*); and

(*a*) Vid. ſup. ch. 9, § 6. n. 2, where it is fully ſhewn in what caſes the ſentence of a foreign court of admiralty ſhall have validity in our courts, and be deemed concluſive evidence to falſify this warranty. Conſult alſo the other ſections of the ſame chapter.——(*b*) Sup. 687.——(*c*) Sup. 246.

little

little need be added here upon this ſubject. Suffice it to ſay, that in the caſe of a *ſhip*, if ſhe be inſured *from* a place, it will be ſufficient to prove that ſhe weighed anchor, or broke ground, in order to ſail on the voyage inſured. If the inſurance be *at and from* a place, the riſk commences from the time of ſubſcribing the policy, if the ſhip be at home; or from the firſt moment of her arrival at the place ſpecified, if that be in a diſtant part of the world.—If the riſk on the ſhip be from the loading of the goods on board, then proof that any part of the cargo has been ſhipped, will be evidence of the commencement of the riſk.

In the caſe of a ſhip.

If the inſurance be on goods, the underwriter may, if he think proper, call on the inſured to prove that they were put in riſk. This may be done by the teſtimony either of the perſons who ſhipped them, or of thoſe who received them, on board the ſhip mentioned in the policy. But the beſt evidence of this is the bill of lading, which, if *bonâ fide* made, is in all countries conſidered as an authentic document, and concluſive evidence of the quantity and ſpecies of goods laden on board; becauſe the captain, who muſt exhibit it on his arrival at the port of deſtination, is intereſted that it ſhall not include more in it than he has on board to deliver.—It is, as *Valin* juſtly obſerves, the true and ſpecific proof of the loading, and not only evidence, as between the captain and the merchant, but alſo againſt inſurers and all others (*a*).—The underwriter may, however, impeach the bill of lading on the ground of fraud or colluſion. But the inſured cannot allege any thing in contradiction to it.

In the caſe of goods.

The loſs may be proved by the parol teſtimony of the maſter, officers, and crew of the ſhip, or by any other legal evidence that can be adduced for that purpoſe.

The proteſt of the captain, ſo long as he is living, is in no caſe evidence on the one ſide or the other; the only uſe that can be made of it is to contradict his teſtimony, if

A proteſt is not evidence, while the perſon who made it is living.

(*a*) *Valin*, h. t. p. 604. Vid. *Pothier*, h. t. n. 144. *Emerig.* ſ. 1, p. 314.

he

he vary from it. And its being ſhewn by the inſurance broker to an underwriter as containing an account of the loſs, for which the inſured claimed, will not make it evidence even againſt the inſured whoſe broker thus produced it.

Senat v. *Porter*, 7 T. R. 158.

The broker's ſhewing it to an underwriter, with other papers relating to the loſs, on demanding payment, will not make it evidence againſt the inſured.

Thus:—An inſurance broker applied to an underwriter for payment of a loſs, producing the different papers relating to the ſubject, and, among the reſt, the proteſt ſigned by the captain. The underwiter told him he had looked into the papers, and as there was a point in the caſe, he would not pay the loſs. In an action on the policy, it was contended on the part of the defendant, that the proteſt was made evidence by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment.---Lord *Kenyon*, who tried the cauſe, being of opinion that the proteſt was not admiſſible evidence, the plaintiff obtained a verdict.—On a motion for a new trial, the court were clearly of opinion that the proteſt, of itſelf, could not be evidence; and its having been in the broker's hands, and ſhewn by him to the defendant, on an application for payment, would no more render it evidence, than a bill in equity could be made evidence againſt the plaintiff, becauſe its contents muſt have been ſhewn to the defendant.

If a loſs by capture be alleged, the plaintiff cannot prove a loſs by perils of the ſea.

The loſs muſt appear to have ariſen from the very cauſe alleged in the declaration, and no other. If, therefore, a loſs be alleged in the declaration to have been occaſioned by *capture*, the plaintiff cannot, under ſuch an averment, prove a loſs by the *perils of the ſea*, or by any other cauſe than capture (*a*).

If a mob board a ſhip and run her on ſhore, whereby goods are loſt; this is a loſs by ſtranding, and not by *detention of people* or by *pirates*.

So, if there be two counts in the declaration, one for a loſs by *detention of people*, the other for a loſs by *pirates*; the plaintiff cannot, on either of theſe counts, give in evidence that a mob of rioters had boarded the ſhip, in

(*a*) Vid. *Kulen Kemp* v. *Vigne*, 1 T. R. 304. ſup. 130.

order

order to compel the captain to ſell a cargo of corn at an inferior price; and that in conſequence of this boarding, the ſhip was ſtranded and a quantity of corn loſt. This could only be given in evidence upon a loſs by *ſtranding* (*a*).

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule, founded on that maxim, that in queſtions of inſurance, he who charges barratry, muſt ſubſtantiate it by concluſive evidence (*b*); yet it has been determined that proof of the captain's having carried the ſhip out of the regular courſe of the voyage, for fraudulent purpoſes of his own, is, *primâ facie*, ſufficient to entitle the plaintiff to recover as for a loſs by barratry; without ſhewing negatively, that he was not the owner, or that this was not done with the owner's conſent (*c*).

Proof that the captain was guilty of barratry, is ſufficient without ſhewing, negatively that he was not owner, &c.

No evidence can be given of any loſs unleſs it be the *immediate* conſequence of ſome peril inſured againſt. That which is only a remote conſequence of ſuch peril is not within the policy. If this rule were not adhered to, it would be impoſſible to draw the line, and the inquiry into the remote conſequences of an accident or misfortune would be infinite.

Every loſs muſt be an immediate conſequence of ſome of the perils inſured againſt.

Therefore, where the plaintiff, upon a policy on ſlaves in the *African* ſlave trade, declares for a loſs by *the perils of the ſea*, he cannot give in evidence a loſs occaſioned by throwing ſlaves overboard on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe (*d*); nor a loſs by the death of ſlaves who periſhed for want of proper food, occaſioned by extraordinary delay in the voyage ariſing from bad and tempeſtuous weather (*e*).

In the caſe of ſlaves.

So, where an inſurance was made on a ſhip and cargo, in the ſlave trade, 'At and from *Briſtol* to the coaſt of

Jones v. *Schmoll*, at N. P. Trin. Vac. 1785, 1 T. R. 130, n.

(*a*) R. *Neſbit* v. *Luſhington*, 1 T. R. 783, ſup. 230, 504.—(*b*) *Baratariæ crimen nunquam eſt preſumendum, ſed concludentiſſimè probandum.* *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99. Vid. *Emerig.* tom. 1, p. 372.—(*c*) R. *Roſs* v. *Hunter*, 4 T. R. 33, ſup. 531.—(*d*) R. *Gregſon* v. *Gilbert*, ſup. 491, 554.—(*e*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656, ſup. 491.

Slaves are inſured againſt mortality by *mutiny*: and, in a mutiny, ſome are killed, others die of their wounds, others of chagrin, &c. The inſurer is liable for theſe

Africa,

who were killed or mortally wounded, in the mutiny; but not for those who died from other causes, though the *remote* consequences of the mutiny; nor for the diminution in value occasioned by the disposition manifested by the mutiny.

'*Africa*, during her stay and trade there, and from thence to 'her port or ports of discharge in the *West Indies*.' There was a memorandum on the policy, in these words;—'The insurers are not to pay any loss that may happen 'in boats during the voyage, (mortality of negroes by 'natural death excepted) and not to pay for mortality 'by *mutiny*, unless the same amount to 10l. *per cent.* to 'be computed upon the first cost of the ship, out-fit, and 'cargo, valuing negroes so lost at 25l. *per* head.'—In an action upon this policy, the demand was for the value of a number of slaves *lost by mutiny*.—The evidence of the captain was that he had shipped 225 prime slaves on board; that on the 23d of *May*, before he sailed from the coast of *Africa*, an insurrection was attempted; that the women seized him on the quarter-deck, and attempted to throw him overboard, but he was rescued by the crew; that the women, and some men, threw themselves down the hatchway, and were much bruised; and 12 men and a woman died of their bruises, and from abstinence; that there was a general insurrection, and the crew were from imminent necessity, obliged to fire upon the slaves, and attack them with weapons; that several slaves took to the ship's sides, and hung down in the water, by the chains and ropes; some for about a quarter of an hour; that several were killed by firing, several wounded, several died from swallowing salt water, or of their wounds, or from bruises, some from chagrin at their disappointment, some from abstinence, some from fluxes and fevers,—in all to the amount of 55, who died during the voyage.—The underwriters had paid for 19, who were either killed during the mutiny, or died of their wounds, which amounted to 15 *per cent.* For the plaintiff it was contended that, though the rest did not actually die in the mutiny, or of any wounds received at that time; yet, as they had all died *in consequence* of the mutiny, the underwriters were liable. Another consequential loss was, that the circumstance of the mutiny had so lessened the value of the slaves, in the estimation of the planters, that they were sold for 17l. a head less than they would otherwise have fetched.—Lord *Mansfield*,

field, who tried the cauſe, ſaid;—"I think the underwriters not anſwerable for the loſs of the market, or the price of it: That is a *remote* conſequence, and not within any peril inſured againſt by the policy. The queſtion for the jury will be, whether any of thoſe, who died by any other means, except the being fired upon, or in conſequence of the wounds and bruiſes which they received during the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny. It is very clear that thoſe who were killed by the firing, or died in conſequence of their bruiſes during the mutiny, are within the policy; the other complicated caſes muſt be left to the jury. I think, clearly, thoſe *not* within the policy, who, being baffled in their attempts, in deſpair, choſe a mode of death, by faſting, or died through deſpondency. That is not a mortality by mutiny, but the reverſe; for it is by the failure of a mutiny—The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards from other cauſes; as thoſe who ſwallowed ſalt water, jumped overboard, &c."—This is the great point."—The jury found,—that all who were killed, or died of their wounds or bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for: But, that all who had died by ſwallowing ſalt water, or leaping into the ſea, or hanging upon the ſides of the ſhip, without being otherwiſe bruiſed, or died of chagrin, were not to be paid for.

Green v *Elmſlie*, at N. P. *Peake*, 212.

So, where the ſhip *Fly* was inſured from *Exeter* to *London*, againſt *capture* only; and the ſhip on her voyage was driven by a gale of wind on the coaſt of *France*, and there captured by the enemy.—In an action on the policy it was contended on the part of the defendant, that this was a loſs by the *perils of the ſea*, and not by capture.—But Lord *Kenyon*, who tried the cauſe, held that this was clearly a loſs by capture; for had the ſhip been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The jury, under this direction, found a verdict for the plaintiff.

A ſhip is driven by *ſtreſs of weather* on an enemy's coaſt, and there captured. This is a loſs by *capture*, not by the perils of the ſea.

If the plaintiff declare upoa a loſs by *fire*, in order to prevent the veſſel and her cargo from falling into the

Upon a declaration for a loſs by *fire*, the plaintiff may prove that the captain

Set fire to the ſhip, to prevent her falling into the hands of the enemy.

hands of the enemy, he may prove that the veſſel being purſued by a privateer, the captain and crew diſcharged her guns down her hatchway, and having ſet her on fire in ſeveral places, left her, and rowed aſhore in the long-boat (*a*).

Carey v. *King*, Ca. temp. *Hard.* 304.

The plaintiff may give in evidence any loſs immediately proceeding from the cauſe alleged.

But the plaintiff may give in evidence any loſs or damage which is an immediate conſequence of the accident or injury alledged in the declaration.—As where it was averred in the declaration, that the ſhip ſprung a leak and ſunk in the river, whereby the goods were ſpoiled: And the evidence was, that many of the goods were ſpoiled, but ſome were ſaved. The queſtion was, whether the plaintiff might give in evidence the *expence of ſalvage*, though not particularly ſtated in the declaration, as a breach of the policy.—Lord *Hardwicke* ſaid,—"I think they may give it in evidence; for the inſurance is againſt all accidents. The accident laid in the declaration is, that the ſhip ſunk in the river: It goes on and ſays, that by reaſon thereof the goods were ſpoiled. This is the only ſpecial damage laid: Yet it is but the common caſe in a declaration that lays ſpecial damage, where the plaintiff may give in evidence any damage that is within his cauſe of action as laid. It was objected that ſuch a breach of the policy ſhould be laid that the inſurer may have notice to defend it. Now it is ſo in this caſe, for they have laid the accident, which is ſufficient notice, becauſe ſome damage muſt have happened."

But it muſt be a direct and immediate conſequence of the cauſe alleged.

The loſs muſt appear not only to have proceeded from the very cauſe alleged in the declaration, but alſo to be a direct and immediate conſequence of the accident or misfortune which has happened to *the very thing inſured*. Therefore an expence which is incurred in conſequence of the accident or misfortune ſtated in the declaration, but which is not incurred in repairing the damage occaſioned by it, cannot be given in evidence as proof of the loſs within the meaning of the policy.

(*a*) Per Lord *Ellenborough*, at N. P. *Gordon* v. *Rimmington*, 1 *Camp.* Rep. 123. Vid. ſup. 494.

As

loſſes have been ſettled, the proviſions put on board the veſſel, when ſhe ſailed, have been conſidered as *part of the ſhip*. The value of the ſhip alone comprehends the hull, the maſts, the tackle, and the *proviſions*. Then, if the proviſions be included in a policy on the ſhip, and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid, that if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, as the argument applies, firſt to a valued, and then to an open policy. As to the firſt: From the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which there can be ſalvage: If the body of the ſhip, and every thing on board, be ſunk, or burned, there can be no ſalvage. And, in caſe of an open policy, the inſured muſt prove, by evidence, what was the value of the whole; and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: But that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent.—In all thoſe caſes the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe, therefore, it is ſufficient to ſay, that an inſurance is on the ſhip *for the voyage*; but during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable (*a*). This caſe alſo differs from *Robertſon* v. *Ewer* in another circumſtance: There, the proviſions were con-

(*a*) There muſt be ſome miſtake of the reporter in this place. It cannot be ſuppoſed that the learned judge ever meant to ſay, that while a ſhip is detained, ſhe is not under the protection of the policy.

ſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as a part of the cargo. The words of Lord *Mansfield*, in that caſe, muſt be taken with reference to the caſe then before him. He was then ſpeaking of a charge for proviſions and during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid;—"There is no authority to ſhew that, on "*this* policy, the inſured can recover for *ſuch a loſs*; but "it is contrary to the conſtant practice." Then he proceeded to ſay that, on a policy on a ſhip, ſailor's wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for proviſions, *eo nomine*, are not taken into conſideration.—If the captain be obliged, in conſequence of the detention, to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe; but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip.—The uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

When the expence of wages and proviſions ſhall be a general, when a particular, average.

By the law of *France* (*a*), the expence of wages, and proviſions of the ſeamen, during a detention, are reputed a *groſs*, or *general average*, if the ſhip was hired *by the month*; but if hired *for the voyage*, this expence is borne by the ſhip alone, as a ſimple average.—*Pothier* (*b*) gives the following reaſon for this diſtinction. The wages of the ſailors being included in the freight, when the ſhip is chartered *for the voyage*, the owner, who receives freight for the whole voyage, is bound to ſupply the labour of the ſailors for the whole time of the voyage, of which the time of the detention makes a part.—On the other hand, when the ſhip is chartered *by the month*, the owner, receiving no freight during the detention, owes no ſervice of the ſailors to the affreighter. The affreighter therefore, ought, in conſideration of the be-

(*a*) Ord. de la mar. tit. *des avaries*, art. 7. Vid. *Emerig.* tom. 1, p. 539.——(*b*) Tit. *des chartes parties*, n. 85.

nefit he derives from the labour of the ſailors, to pay for their labour and proviſions during the detention.

But the uſage of trade often controls the general conſtruction of the policy; and what ſhall or ſhall not be protected as part of the ſhip and furniture depends, in ſome caſes, on the uſage of a particular trade.

But the uſage of trade often determines what ſhall be deemed part of the ſhip.

As where an inſurance was made, in the uſual form, on a ſhip employed in the *Greenland* fiſhery; and, in an action on the policy, the queſtion was, whether the *fiſhing-tackle* was included in the inſurance on the *ſhip, furniture*, &c.—Lord *Mansfield*, who tried the cauſe, ſaid, that there was no doubt but that the boats, and rigging, and ſtores, belonging to the ſhip, were included; and as to the fiſhing ſtores, it muſt depend on the *uſage of the trade*. On this, there was contradictory evidence. The plaintiff, however, obtained a verdict, which the court afterwards ſet aſide, and granted a new trial, upon the ground that the evidence of the uſage was principally in favour of the defendant.

Hoſkins v. *Pickerſgill*, E. 23. *G.* III. B. R. MS.

Whether the fiſhing tackle in the *Greenland* whale fiſhery be included in a policy on the ſhip, depends on the uſage of the trade.

In a former chapter we had occaſion to obſerve that the *captain's clothes*, the *ſhip's proviſions*, and *goods laſhed to the deck* are not comprehended under the general denomination of "*goods, wares, and merchandizes*," in the policy; and that the inſurer is not, therefore, liable for any loſs on theſe articles unleſs they be ſpecifically named (*a*).

The *captain's clothes, the ſhip's proviſions, and goods laſhed to the deck*, are not within a policy on *goods*.

Therefore, where an action was brought on a policy on *goods*, the property of the captain, for ſix months, the loſs proved was chiefly for *goods laſhed to the deck*, the captain's *clothes*, and the *ſhip's proviſions*.—On the part of the defendant it was proved by an underwriter and a broker, that none of theſe things are within a general policy on *goods*; becauſe the riſk is greater, as to goods laſhed on deck, than on other goods; and that a policy on goods generally, means only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore that when goods like the preſent are meant to be inſured, they are always inſured by name, and the pre-

Roſs v. *Hunter*, at N. P. after Hil. 16 *G.* III. *Park* 20.

(*a*) Vid. ſup. 319.

mium is greater.—Lord *Mansfield* ſaid he thought it conſiſtent with reaſon, and underſtood the uſage to be ſo; and therefore the plaintiff withdrew a juror, the premium having been paid into court.

The inſured on *goods*, is not entitled to freight paid *pro rata itineris*, during capture.

In an action on a policy on *goods*, the inſured cannot recover for freight *pro rata itineris* paid by the owner of the goods to the owner of the ſhip; where the ſhip is captured and detained by a foreign power, and afterwards reſtored.

Tullie v. *Modigrant*, Hil. 25. G. III. B. R. MS.

Thus: In an action on a policy on goods, 'At and 'from *Nevis* to *Briſtol*,' it appeared that the ſhip on her voyage was captured by the *French*, carried into *Morlaix*, and there condemned. Upon an appeal to the parliament of *Paris*, this ſentence was reverſed, and the ſhip and cargo were decreed to be reſtored; or the net proceeds thereof, if ſold, to be paid to the claimants. The ſhip and cargo having been ſold before this ſentence was obtained, the money, after deducting all charges, was remitted to the plaintiff, who was agent for the owners of the ſhip, for the owners of the goods, and for the underwriters.—The underwriters paid the charges of the ſuit, and all other expences. The plaintiff (the common agent) paid to the owners of the ſhip, freight *pro rata itineris*; and the queſtion was, whether he was to be reimburſed by the owners of the goods, or whether this was a loſs within the policy, for which the underwriters were liable.—The court, after time taken to deliberate, were unanimouſly of opinion, that the underwriters were not liable to this charge.—Lord *Mansfield* ſaid;—"The queſtion is, whether the owner of the goods can charge the underwriters with this *item*, which was paid for freight *pro rata itineris*, by the owners of the goods to the owners of the ſhip. As between the owners of the ſhip, and the owners of the cargo, in caſe of a total loſs, no freight is due: But, as between *them*, no loſs is total, where part of the property is ſaved, and the owner takes it to his own uſe. Here the value of of the goods was reſtored in money, which is the ſame as the goods: and therefore freight was certainly due *pro rata itineris*. But, as between the inſured and the underwriters

Goods are inſured, the ſhip and goods are captured and ſold, but the ſentence reverſed, and the proceeds ordered to be paid to the owners:—The freight *pro rata itineris*, paid by the owner of the goods, is not a charge for which the inſurers on the goods are liable.

As where a ſhip was inſured, 'At and from *London* to '*Newcaſtle* and *Marſeilles*, and from thence to the *Weſt-Indies*.'—The ſhip, in diſtreſs, bore away for *Minorca*, where it being found neceſſary to repair her, ſhe was unavoidably detained there a conſiderable time.—The inſured brought an action on the policy, to recover the extraordinary *wages and proviſions* expended during this detention: But Lord *Mansfield*, who tried the cauſe, was of opinion that ſuch a demand could never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

Fletcher v. *Poole*, at N. P. after Eaſt. 1769, *Park* 52.

Wages and proviſions expended during a repair of ſea-damage, is not a loſs within a policy on the *ſhip*.

So, where an inſurance was made 'on *ſhip and goods*, 'from *Oſtend* to *Dominique*.'—The ſhip in her voyage having met with bad weather, and being in great diſtreſs, the crew threatened to take the command from the maſter, unleſs he would make for the firſt port. The maſter bore away for *Ferrol* to repair the ſhip; but by the time the repairs were finiſhed, the crew deſerted her. He then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him, and after detaining him 37 days, diſcharged him, and he proceeded on his voyage, and at length arrived at *Dominique*.—An action was brought on the policy to recover the loſs incurred by *wages*, *proviſions*, and *demurrage*, during the ſhip's detention at *Ferrol*. On the part of the underwriters it was contended that the *freight*, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy.—Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and non-ſuited the plaintiff.

Eden v. *Poole*, at N. P. after Hil. 1785, *Park* 54.

Upon a policy on *ſhip and goods*, the inſured cannot recover for wages proviſions or demurrage, during a ſhip's ſtay for repair, and detention by a foreign power.

So, where a *ſhip* was inſured, 'At and from *London* 'to *Africa*, during her ſtay and trade there, and to her 'port of diſcharge in the *Weſt Indies*;'—the ſhip on her voyage from *Africa*, with a cargo of ſlaves, to her port of diſcharge in the *Weſt Indies*, touched at *Barbadoes* for the purpoſe of watering, where ſhe was detained a conſiderable time by an embargo, which had been before laid by the commander in chief on all ſhips at that iſland. The captain applied for leave to depart, and being refuſed, he ſailed without leave, but was purſued by a ſloop

Robertſon v. *Ewer*, 1 T. R. 127.

The inſured upon a policy *on the ſhip*, cannot recover the expence of wages or proviſions occaſioned by a detention under an *embargo*.

of war, and after a ſlight engagement, brought back, and the crew diſtributed among the men of war. The embargo continued from the 18th of *December*, till the 27th of *January*. The ſmall pox broke out among the ſlaves on the 22d of *January*. In conſequence of all this, and for want of mariners to navigate the ſhip, ſhe was detained at *Barbadoes* above two months after the embargo was taken off. She then ſailed to *Jamaica*, her place of diſcharge.—In an action on the policy to recover the amount of the additional *wages and proviſions* occaſioned by the ſhip's detention under the embargo, Mr. Juſtice *Buller* was of opinion that this policy, being upon the body of the ſhip, and the average loſs thereon, excluſive of the charge for wages and proviſions, being leſs than 3 *per cent.*, the plaintiff was non-ſuited. Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiff, *firſt*, that this loſs, being occaſioned by the embargo for which the inſured might have abandoned, and recovered as for a total loſs, he might recover a partial loſs to the amount of the damage actually ſuſtained (*a*); and *ſecondly*, that this was a loſs occaſioned by the barratry of the maſter, by his reſiſtance to lawful authority.—But the court determined that the plaintiff had no right to recover on either ground.—Lord *Mansfield* ſaid,—"There is no authority to ſhew that, on this policy, the inſured can recover for ſuch a loſs; but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailor's wages, or proviſions, are never allowed in ſettling the damages. The inſurance is on the body of the ſhip, tackle, and furniture; not on the voyage or crew. Here it is admitted that no damage was done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."—Mr. Juſtice *Buller* ſaid;—"If the ſhip had been detained in conſequence of an injury which ſhe had received in a ſtorm, though the underwriters muſt have made good the damage; yet the inſured could not have claimed

(*a*) Vid. *Roteh* v. *Edie*, 6 T. R. 425. ſup. 44, 511.

the

the amount of wages or proviſions, during the time ſpent in repairing. The court only look to the *ſubject matter of the inſurance.* Here the ſhip was ſafe; and the wages and proviſions are no part of the thing inſured."

Yet, in the following caſe, which is not eaſily reconcilable with the three foregoing caſes, it was the opinion of the court that a ſhip's proviſions are protected by the policy, even when landed on a *Bank Saul* during a repair; and that they were to be conſidered as a *part of the ſhip.*

Yet a ſhip's proviſions are conſidered as *part of the ſhip*, and are protected by the policy.

An inſurance was made on a *China* ſhip, and, in the uſual words, 'On the tackle, ordnance, ammunition, 'artillery, and *furniture* of the ſhip.—In an action on this policy, it appeared that while the ſhip was lying off *Bank-Saul Iſland*, in the river *Canton*, it became neceſſary to refit her, for which purpoſe, the ſtores and proviſions were taken out of her, and put into a warehouſe called a *Bank-Saul*, where they were deſtroyed by accidental fire.—At the trial, this accident was conſidered as if it had happened *on board the ſhip* (*a*), and it was admitted that the policy covered all the articles but the *proviſions*; and if they were not protected by the policy, then there would not be a partial loſs of 3 *per cent.*—On the part of the defendant it was contended that the proviſions, which were merely for the ſhip's crew, were not protected by a policy on the *ſhip.* But one of the jury, obſerving that it had been determined in Lord *Mansfield*'s time, that they were included under the word '*furni*-'*ture*,' and that the merchants in the city had ever ſince acquieſced in this deciſion, there was a verdict for the plaintiff.—On a motion for a new trial the above caſe of *Robertſon* v. *Ewer* was relied on as a clear authority to ſhew that the ſhip's proviſions were not protected by a policy on the ſhip; and that, if proviſions were included in the term 'furniture,' there could never be a total loſs, after a conſumption of any part of them. —The court, however, were unanimouſly of opinion that the underwriters were liable for the expence of the pro-

Brough v. *Whitmore*, 4 T. R. 206.

A ſhip's proviſions, during a repair, are landed on a *Bank Saul*, and there conſumed by fire: The underwriters on the ſhip and *furniture* are liable.

(*a*) Vid *Pelley* v. *Roy. Ex. Aſſ.* 1 *Bur.* 341, ſup. 269.

viſions which were bought to replace thoſe conſumed by the fire, which was an accident within the words of the policy.—Lord *Kenyon* ſaid;—"When it was ſtated, at the trial, that *proviſions* were included in the word '*furniture*' I confeſs I was ſomewhat at a loſs to know to what extent the underwriters were liable on words ſo indefinite as thoſe which are uſed. If the proviſions be inſured as part of the out-fit of the ſhip, and they were deſtroyed by one of the perils inſured againſt, there is an end of the queſtion; a loſs has happened within the meaning of the policy, and conſequently the defendant is liable. But it was ſaid in the argument, that the inſtant any of the proviſions were conſumed on board, there could not be a total loſs. But the anſwer is, that that comes within the *wear and tear of the ſhip*; and it might as well be ſaid, that if a maſt were a little injured, there could not be a total loſs. The caſe of *Robertſon* v. *Ewer* is clearly diſtinguiſhable from the preſent. Here the proviſions were conſumed by an accidental fire on board the ſhip, (for the iſland and the ſhip were, for this purpoſe, the ſame), and within the meaning of the policy; but, in that caſe, they were conſumed *by the negroes*, during the detention of the ſhip (*a*)."—Mr. Juſtice *Buller* ſaid, —"It is perfectly clear that, in every inſtance where

Diſtinctions between this caſe and that of *Robertſon* v. *Ewer*.

(*a*) According to the Report of *Robertſon* v. *Ewer*, Lord *Mansfield* laid it down as a general rule, not reſtricted to any particular trade, that on a policy on a *ſhip*, ſailor's wages or *proviſions* are never allowed in ſettling the damages; nor was it ever objected in that caſe, that the proviſions had been conſumed by the ſlaves. It is not likely, indeed, that ſuch an objection could have been made; for it is well known, that the food provided for the ſlaves was part of the cargo, and very different from that which was provided for the ſhip's company; beſides, the ſhip's company muſt have conſumed a part. But, be this as it may, if it be neceſſary, in order to ſupport the caſe of *Robertſon* v. *Ewer*, to ſuppoſe that the proviſions, for which the inſured wanted to charge the underwriters, were *conſumed by the ſlaves*, and not by the crew, then the caſes of *Fletcher* v. *Poole*, and *Eden* v. *Poole*, where no ſuch ground could be alleged, cannot be ſuſtained.

loſſes

BOOK THE SECOND.

Of Bottomry and Reſpondentia.

THIS ſubject may be treated uuder the following diſtribution;

I. *Of the nature and form of the Contract;*
II. *Of the Parties to it;*
III. *Of the thing hypothecated;*
IV. *Of the principal and marine Intereſt;*
V. *Of the perils or riſks to which the lender is liable;*
VI. *Whether he be liable to* general average;
VII. *Whether he be entitled to the* benefit of ſalvage.

CHAP. I.

Of the Nature and form of this Contract.

Bottomry defined.

BOTTOMRY is a contract in nature of a mortgage of a ſhip, on which the owner borrows money to enable him to fit out the ſhip, or to purchaſe a cargo for a voyage propoſed; and he pledges the keel or *bottom* of the ſhip, *pars pro toto*, as a ſecurity for the repayment: And it is ſtipulated that if the ſhip ſhould be loſt in the courſe of the voyage, by any of the perils enumerated in the contract, the lender alſo ſhall loſe his money; but if the ſhip ſhould arrive in ſafety, then he ſhall receive back his principal, and alſo the intereſt agreed upon, which is generally called the *marine intereſt*, however this may exceed the legal rate of intereſt (*a*). Not only the ſhip

(*a*) Vid. 2 *Bl.* Com. 458.

and

and tackle, if they arrive ſafe, but alſo the perſon of the borrower, is liable for the money lent and the marine intereſt.

Denomination.

The contract of bottomry is called by the *French*, *contrat de prêt à la groſſe avanture*, or *contrat à la groſſe*. In *Le Guidon* (*a*) it is called *bomerie*, and *Molloy* (*b*) ſays that it is derived from *bomerie* or *bodmerie*, a *Flemiſh* word which ſignifies the *keel* or *bottom* of a ſhip.

Reſpondentia.

When the loan is not on the ſhip, but on goods laden on board, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, the borrower's perſonal reſponſibility is then the principal ſecurity for the performance of the contract, which is therefore called *reſpondentia* (*c*). In this conſiſts the principal difference between bottomry and reſpondentia. The one is a loan upon the ſhip, the other upon the goods. The money is to be repaid to the lender, with the marine intereſt, upon the ſafe arrival of the ſhip, in the one caſe, and of the goods, in the other. In all other reſpects, theſe contracts are nearly the ſame, and are governed by the ſame principles. In the former, the ſhip and tackle, being hypothecated, are liable, as well as the perſon of the borrower; in the latter, the lender has, in general, only the perſonal ſecurity of the borrower.

Difference between them.

According to the *French* writers, the perſonal reſponſibility of the borrower is not, in all caſes the only ſecurity of the lender. Where the money is lent for the outward and homeward voyages, the goods of the borrower on board, and the returns for them, whether in money, or in other goods purchaſed abroad, with the proceeds of them, are liable to the lender (*d*). But the following caſe ſhews, that in *England*, unleſs there be an expreſs ſtipulation to that effect in the bond, the lender has no *lien* on the homeward cargo, nor any other ſecurity for his de-

(*a*) Ch. 18. —— (*b*) De jur. marit. b. 2, c. 11, § 12. —— (*c*) 2 *Bl.* Com. 458. —— (*d*) *Pothier*, h. t. n. 34. *Emerig.* tom. 2, p. 476. 561.

mand

mand than the perſonal reſponſibility of the borrower or his ſureties, if he has any.

Buſk v. *Fearon* & others, 4 *Eaſt* 31).

A reſpondentia bond, upon an *Eaſt India* voyage, was given by *Fearon* and *Douglas* in the uſual form (*a*); and the condition, after reciting 'that the money was lent 'upon the goods laden, *and to be laden*, on board the ſhip '*Belvedere* outward bound to *China*, was, that if the ſhip 'ſhould proceed on her voyage and return within 36 'months, (the dangers of the ſeas excepted) and if the 'borrowers, within 30 days after her arrival, ſhould pay 'to the lender the ſum lent, with the marine intereſt 'agreed on; or if, within the 36 months, the ſhip ſhould 'be loſt, and the borrowers ſhould, within ſix months 'after ſuch loſs, account for and pay to the lender a 'proportionable average on all goods carried out, and the 'net proceeds thereof, *and on all other goods which the bor-* 'rower *ſhould acquire during the voyage, for or by reaſon of* 'ſuch goods, and which ſhould not be unavoidably loſt, 'then the obligation to be void.'—The goods were diſpoſed of in *China*, and other goods purchaſed there with the produce thereof, with which the ſhip returned home, and arrived in the *Thames*. The goods ſo brought from *China* were depoſited in the warehouſes of the *India Company*, and *Douglas* being dead, and *Fearon* having become bankrupt,—the queſtion was, whether the lender had ſuch a *lien* upon, or intereſt in, the homeward cargo, or the proceeds thereof in the hands of the *Company*, as entitled him to claim it to the extent of his demand upon the bond.—The court determined that he had no ſuch *lien* upon, or intereſt in, the homeward cargo.

The lender upon a reſpondentia bond in the uſual form has no *lien* or intereſt in the homeward cargo purchaſed with the produce of the goods upon which the money was lent.

Though it is extremely probable, as we have already ſhewn (*b*), that the contract of inſurance was unknown among the ancients, it is certain that the *Romans* were well acquainted with that of bottomry, or rather reſpondentia, which they denominated *nauticum fœnus* or *contractus trajectitiæ pecuniæ*; and it is treated of both in the *Digeſt* and the *Code*, *de nautico fœnore*. They called the ſum lent

In uſe among the *Romans*.

(*a*) Vid. Appendix No. V.—(*b*) —Sup. 5.

pecunia

Pecunia trajectitia.

pecunia trajectitia, perhaps becauſe the borrower was uſed to take the money on board with him in ſpecie, in order to employ it in trade in the courſe of the voyage; for ſuch was probably the original deſtination of ſuch loans among the *Romans*, who exported very little from *Rome*, but ſent money from thence to purchaſe the merchandiſe which the conſumption of that immenſe city demanded. The money thus lent was to be repaid, if the voyage proved fortunate, with a ſtipulated intereſt, which was called *periculi pretium*, ſometimes *uſura maritima*, or *uſura nautica*; but upon this condition, that if the ſhip ſhould be loſt by the perils of the ſea, in the courſe of the voyage propoſed, the lender ſhould loſe both principal and intereſt.

If the money was ſpent on ſhore, it was not *pecunia trajectitia*.

If the money was ſpent in the place where it was lent, it was not *pecunia trajectitia* (*a*). But if it was laid out in the purchaſe of goods, which were embarked at the riſk of the lender, then it retained its quality of *pecunia trajectitia*. So that, with the *Romans*, as with the moderns, it was of the eſſence of this contract that the loan ſhould be expoſed to the perils of the ſea, at the riſk of the lender.

Whether the *Roman nauticum fœnus* be materially different from the modern bottomry.

The author of *Le Guidon* (*b*) ſays that there is but little reſemblance between the contract of bottomry, as it is in uſe in modern *Europe*, and the *nauticum fœnus* of the *Romans*. But, with all due deference for the learned author of that treatiſe, it ſeems to me that, upon an attentive compariſon of the one with the other, it will be found that they are ſtill in principle the ſame; and only differ in the forms which modern regulations have given to the contract now in uſe.

How bottomry differs from a ſimple loan.

Bottomry differs materially from a ſimple loan. In a loan, the money is at the riſk of the borrower, and muſt be paid at all events. *Incendium ære alieno non liberat debitorem* (*c*). But in bottomry, the money is at the riſk of the lender during the voyage. Upon a loan,

---

(*a*) *Si eodem loco conſumatur, non erit trajectitia*, ff. *de naut. fœn.* 1.——(*b*) Ch. 18. art. 1.——(*c*) Cod. l. 11, *ſi cert. pet.*

only

underwriters *upon the cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*. The owner of the ſhip has a lien for his freight; but in the caſe of a loſs, really total, no freight is due. In the caſe of a loſs, total as between the inſurer and inſured, with ſalvage, the owner may either take the part ſaved or abandon; but in neither caſe can he throw the freight upon the underwriters; becauſe they have not engaged to indemnify him againſt it, and have nothing to do with it."

The underwriters on *goods* are in no caſe liable for *freight*.

In aſſumpſit the plaintiff recovers damages according to the evidence *pro tanto*, and therefore he is not obliged to prove all the damages alledged in his declaration. Hence, though the plaintiff declare as for a *total loſs*, he may recover as for a *partial loſs*.—So, if he declare as for a total loſs of the entire thing inſured, when in fact he was only owner of, or intereſted in a *part* thereof, and the loſs be only partial, yet he ſhall recover his proportion of ſuch partial loſs to part.

If the plaintiff declare upon a total loſs, he may recover for a partial loſs.

So, if he declare for a loſs upon an *entire thing*, when he is only a part owner.

Thus:—An inſurance was made on *one fourth* of a ſhip; and the inſured declared expreſsly as for a *total loſs* of the ſhip; but the evidence only proved a partial loſs; nor was it attempted to prove a total one, the damage being ſo ſmall that it might have been repaired for 50l. —It was objected at the trial, on the part of the defendant, that evidence of a *partial loſs*, was not ſufficient to maintain a declaration for a *total loſs*, and it was ſuggeſted that the practice was contrary.—A verdict, however, was taken as for a partial loſs, ſubject to the opinion of the court on the above queſtion.—The court were clearly of opinion with the plaintiff.—Lord *Mansfield* ſaid;—"I was ſatisfied upon principles, provided the practice did not interfere; but, having heard of no determination in ſupport of the practice alleged, the caſe muſt ſtand upon principles; and, upon principles, it is clear that the plaintiff may, upon this declaration, recover as for a partial loſs. This is an action of *aſſumpſit*, which is a liberal action; and the plaintiff may recover *leſs* than his declaration would ſupport, though not *more*. There are two grounds of the plaintiff's declaration

Gardiner v. *Croſdale*, 2 *Burr.* 904, 1 Bl. 198.

Upon inſurance of a *fourth* of a ſhip, plaintiff declares as for a *total loſs*; but proves only a *partial loſs*; he ſhall recover ſuch partial loſs.

claration; the policy, and the damage to the ſhip. Whether this be a total or a partial loſs, is a queſtion that goes to the *quantum of damages*, not to the *ground of the action*. The ground of the action is the ſame, whether the loſs be total or partial; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loſs; this, indeed, would be an objection, if it were true: But the defendant does, in truth, come prepared to ſhew, either that no damage had happened at all; or, at leaſt, that damage had not happened to the extent alleged.—Neither could the defendant have been hurt by a judgment by default; for the plaintiff could not have recovered upon the writ of enquiry, more damages than he could prove that he had actually ſuffered. If this objection were to prevail, it would introduce the addition of unneceſſary counts in the declaration. In an ejectment for more, the plaintiff may recover leſs: It is every day's practice."—Mr. Juſtice *Deniſon* concurred, and ſaid;—"In an action for damages, the plaintiff is to recover according to his proof, *pro tanto*; but he is not obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a houſe, might not the plaintiff be entitled to damages for pulling down a part of it? This is no variance of the evidence from the declaration. The evidence tends, in a certain degree, to the proof of what is alleged in the declaration. Two counts would have been unneceſſary."

Riſing v. *Burnett*, at N. P. C. B. 12 *December* 1798. MS.

One of ſeveral part owners of a ſhip may inſure the freight generally, without mentioning what ſhare he has in the ſhip; and he may declare generally, and recover according to his intereſt.

So, where the plaintiff was one of four part owners of a ſhip, and each inſured the freight without mentioning that it was only a *ſhare of the freight* that he was intereſted in.—The plaintiff, in his declaration, ſtated his intereſt generally, and not as being an *aliquot* part of the ſhip.—It was objected on the part of the defendant, that the plaintiff ſhould have alleged his intereſt according to the truth, and not in that general form. That the regiſter of the ſhip, which was produced, was concluſive evidence as to the perſons who were owners, and of their reſpective ſhares; and the regiſter ſhewed that the plaintiff was only owner of the fourth part.—Mr. Juſtice *Buller*, who tried the cauſe, held, that this being an open

policy

policy (*a*), the plaintiff might recover according to his intereſt; and he had a verdict accordingly.

So, if the plaintiff prove a greater intereſt than he alleged in his declaration, this ſhall not preclude him from recovering to the extent of the intereſt he has alleged.

A fortiori if he prove a greater intereſt than he alleged.

Thus, where the declaration ſtated that the plaintiff was poſſeſſed of *one third* of the ſhip inſured; and it was proved that he had purchaſed the *whole* at one period; and there being no evidence to ſhew that he had ſince parted with any ſhare of it, it was inſiſted that this was a variance.—But Lord *Mansfield* held that this was ſufficient evidence; for, *omne majus continet in ſe minus*, and overruled the objection.

Page v. *Rogers*, at N. P. after Hil. 1785, *Park* 402.

By the preamble to the ſecond ſection of the ſtat. 19 *G.* II. c. 32, it appears that, before the paſſing of that act, if an obligor in any bottomry or reſpondentia bond, or an inſurer in any policy of inſurance, became bankrupt before a loſs happened, it was made a queſtion whether the inſured in ſuch policy, or the obligee in ſuch bond, could be let in to prove his debt, or to receive any dividend under the commiſſion: But now, by that ſection, it is provided, 'That ſuch obligee or inſured 'ſhall be admitted to claim, and after the loſs or con'tingency ſhall have happened, to prove, his debt, and 'to receive a dividend of the bankrupt's eſtate, in pro'portion to the other creditors; and that the bankrupt 'ſhall be diſcharged from the debt owing from him on 'ſuch bond or policy, in like manner as if ſuch loſs or 'contingency had happened, and the money had been 'payable, before the iſſuing of the commiſſion."

By 19 *G.* II, c. 32, if an underwriter become bankrupt before a loſs happen, the inſured may claim; and after a loſs, prove his debt under the commiſſion, and receive his dividend, as if the loſs had happened before the bankruptcy.

As the words of the above preamble refer only to bottomry contracts, and inſurances on ſhips and goods on board, it became a doubt whether it extended to *inſurances upon lives*, though the words of the enacting part are general; and it was ſuppoſed that the legiſlature could

This ſtatute extends to inſurances upon lives.

(*a*) Had it been a *valued policy*, it would have made no difference in this caſe; for the inſurer may diſpute the amount of the intereſt of the inſured if it be over-valued, as well in an action upon a valued policy as upon an open one,

not

not have had insurance upon lives in contemplation, because the risk in such insurances may remain unsettled for many years:—But it has been determined that the general words of the enacting part are not restrained by the preamble; and that it comprehends *all insurances*, and consequenly insurances *upon lives* (*a*).

Sect. VI.

Of the Recovery back of Losses improperly paid.

If an underwriter, after he has paid a loss, discover fraud, which before he was not apprized of, he may maintain an action to recover back the loss so improperly paid.

IT sometimes happens that, after a loss has been paid, the underwriter discovers that there was fraud in the original contract, or that there were circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand. In such case, he may maintain an action against the insured for money had and received to his use, to recover back the sum so improperly demanded.—But if, at the time he paid the money, he knew, or might, upon enquiry, have been informed of the grounds upon which he could have resisted the claim, he cannot afterwards bring an action to recover it back; for this would open a door to infinite litigation. A *fortiori* if the underwriter had paid the loss under legal compulsion (*b*).—If, however, after the insured has recovered the loss, by process of law, the underwriter receive intelligence of the fraud, which, by no possibility he could have known while the suit was depending, he may, in that case, I conceive, maintain an action to recover back the money so wrongfully obtained from him (*c*); for this would not be trying, in the new action, any ground of defence of which he might have availed himself in the first.

(*a*) R. *Cox* v. *Liotard*, B. R. Hil. 24 *G.* III. *Doug.* 166, n. Vid *Pattison* v. *Banks*, *Cowp.* 540; and *Mace* v. *Cadell*, *Cowp.* 232.——(*b*) R. *Marriott* v. *Hampton*, 7 T. R. 269. Semb. cont. *Moses* v. *Macfarlane*, 2 *Bur.* 1005. Vid. *Livesay* v. *Ryder*, *E.* 22. *G.* 3. B. R.——(*c*) Vid. *Pothier*, h. t. n. 14.

END OF THE FIRST BOOK.

only the legal intereſt can be reſerved: But upon bottomry, any intereſt may be legally reſerved which the parties agree upon.

Analogy between bottomry and inſurance.

The analogy between this contract and that of inſurance is much ſtronger. In the one the lender, in the other the inſurer, is liable to the perils of the ſea; the one receives the marine intereſt, the other the premium, as the price of the riſk, which varies in each according to the length and danger of the voyage. The lender and the inſurer are, in general, expoſed to the ſame perils, which have the ſame commencement and end. Both are entitled to the benefit of ſalvage, and liable to general average. The marine intereſt, like the premium of inſurance, is not due, if no riſk be run, though this be prevented by the voluntary act of the borrower.

How they differ

But though theſe contracts thus far agree, they differ eſſentially in many reſpects. In bottomry, the lender furniſhes the borrower with the money to purchaſe the goods which are put in riſk; an inſurer, on the contrary, furniſhes nothing of the ſubject matter of the inſurance.—The lender, in taking upon himſelf the riſk of the goods, does not contract any obligation to the borrower; a loſs by the perils of the ſea does not make him a debtor to the borrower, but only prevents the borrower from becoming his debtor: Whereas, upon a loſs happening, the inſurer becomes a debtor to the inſured to the amount of ſuch loſs, not exceeding the ſum inſured (*a*).—In caſe of ſhipwreck, the lender, by the general law, has a *lien* on the effects ſaved, to the extent of the ſum lent and the marine intereſt, *to the excluſion of the borrower*; whereas an inſured has an intereſt in the effects ſaved, *in common with the inſurer*, ſo far as he was uninſured.—The lender is not liable for particular average; but the inſurer is liable for this, unleſs he be exempt by expreſs ſtipulation.—By the clauſe, *free of average*, inſurers may be exempted from general average; but, in a caſe where the lender is liable by law to gene-

(*a*) *Pothier*, h. t. n. 6.

ral average, ſuch a clauſe would be illegal and void (*a*). If the voyage be diviſible into ſeveral diſtinct riſks, the premium of inſurance may be apportioned to each, and there may be a return for ſuch as have not been begun; but, in bottomry, if the riſk be once commenced, and no loſs happen, the marine intereſt muſt be paid entire (*b*).

The utility of this contract.

This contract is of great utility in a country where the perſons engaged in trade have not a ſufficient capital to carry on their foreign commerce, by inducing thoſe unſkilled in trade to embark their money in it; and thus is formed a ſort of partnerſhip between the lender and the borrower, in which the one ſupplies capital the other ſkill and experience: The one takes upon himſelf the perils of the ſea, and the other compenſates him by a ſhare of the profits of the adventure. But, except in this reſpect, this contract has no reſemblance to a regular partnerſhip, having in it no community of capital, no community of loſs (*c*).

Not now much in uſe in this country.

Formerly the practice of borrowing money on bottomry and reſpondentia was more general in this country than it is at preſent. The immenſe capitals now engaged in every branch of commerce, render ſuch loans unneceſſary; and money is now ſeldom borrowed in this manner, but by the maſters of foreign ſhips who put into our ports in need of pecuniary aſſiſtance to refit, to pay their men, to purchaſe proviſions, &c. Sometimes officers and others belonging to ſhips engaged in long voyages, who have the liberty of trading to a certain extent with the proſpect of great profit, but without capitals of their own to employ in ſuch trade, take up money on reſpondentia to make their inveſtments: But even this, as I am informed, is now not very frequently done in this country.

It is uſually either in the form of a deed poll or a bond.

This contract, which muſt always be in writing, is ſometimes made in the form of a deed poll, called a

(*a*) *Pothier*, h. t. n. 46; *Valin* on art. 16, h. t.; *Emerig.* t. 2, p. 505.——(*b*) *Emerig.* t. 2, p. 397.——(*c*) *Sav.* Dict. h. t. *Caſaregis* diſc. 7, n. 2; *Emerig*, t. 2, p. 394.

bill

bill of bottomry, executed by the borrower (*a*), ſometimes in the form of a bond or obligation, with a penalty (*b*). But whatever may be its form, it muſt contain the names of the lender and the borrower, thoſe of the ſhip and the maſter; the ſum lent, with the ſtipulated marine intereſt; the voyage propoſed, with the duration of the riſk which the lender is to run: It muſt ſhew whether the money be lent on the ſhip, or on goods on board, or on both; and every other ſtipulation and agreement which the parties may think proper to introduce into the contract (*c*).

The marine intereſt muſt be expreſsly reſerved in it.

It is eſſential to this contract that the marine intereſt be expreſsly reſerved in it (*d*). *Straccha* (*e*), indeed, holds that, without this, the law would look upon the contract only as a ſimple loan, upon which the lender had gratuitouſly taken upon himſelf the perils of the ſea. *Emerigon*, however, holds (*f*) that this being a contract founded in good faith, equity will ſupply the omiſſions occaſioned by miſtake or inadvertence; and that, as the lender ſubjects himſelf to the perils of the ſea, and the borrower reaps the fruits of the adventure, commutative juſtice requires that the former ſhould receive, beſide the legal intereſt of his money, a ſatisfaction for the riſk he he has run.

Whether equity would ſupply the omiſſion of this.

(*a*) Vid. Append. No. VI.——(*b*) Vid. Append. No. VII.——(*c*) Vid. *Pothier*, h. t. n. 30; *Emerig.* t. 2, p. 402.——(*d*) *Pothier*, h. t. n. 19.——(*e*) Introd. n. 24.——(*f*) t. 2, p. 406.

CHAP II.

Of the Parties to this Contract.

Who may lend on bottomry.

THE parties to the contract of bottomry are the lender and the borrower. Of the former, it is ſufficient to ſay, that any perſon, who is in a capacity to contract, may lend money on bottomry.

Who may borrow.

With reſpect to the borrower, every perſon who has a veſted aſſignable property in a ſhip or cargo, may, by the general law of merchants, borrow money on bottomry or reſpondentia thereon, to the extent of his intereſt.

When the maſter may hypothecate the ſhip.

This contract ſeems originally to have ariſen from the practice of permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip, in caſes of neceſſity, in order to raiſe money to refit (*a*). And it is eſſential to the ſafety of the ſhip and the ſucceſs of the voyage, that the maſter, in the abſence of the owners, ſhould have this power, which is, indeed, by the marine law, implied in his appointment (*b*).

He can only do this in the abſence of the owners.

But as the owners are preſumed to give entire authority to the maſter, only in their abſence, and for ſuch affairs as they cannot themſelves conveniently tranſact, he is not in fact maſter till after he ſets ſail. Till then, he is ſubject to their orders, and they have the power of diſmiſſing him at pleaſure; till then, therefore, he can tranſact no buſineſs of importance, but under their immediate directions (*c*). Hence, if the maſter borrow money on bottomry in the place where the owners reſide, without their expreſs authority, it can only affect his own intereſt on board.

Yet, if money borrowed where the owners reſide be laid out on the ſhip, the owners ſhall be liable for it.

Yet, it is ſaid that if the money thus borrowed be beneficially employed in ſupplying the neceſſities of the ſhip and in diſcharge of the owners, they are liable for the money thus laid out (*d*). But this liability muſt be underſtood as for money paid for their uſe, not upon the contract of bottomry.

(*a*) Vid. 2 *Bl.* Com. 458 ——(*b*) Per *Holt*, C. J. in *Bernard* v. *Bridgeman*, Hob. 12.——(*c* Conſolato del mare, ch. 236.——(*d*) *Vinnius*, ad ff. de exercit. § 4, p. 844.

Even

Even in a foreign country, and in the abſence of the owners, the maſter cannot take up money on bottomry, for any debt of his own (*a*), but only for the uſe of the ſhip, in caſes of neceſſity; and this muſt appear in the written contract, otherwiſe the lender will neither have a *lien* on the ſhip, nor an action againſt the owners. The maſter in ſuch caſe would be alone liable, though it ſhould appear that the money was ſpent in ſupplying the neceſſities of the ſhip (*b*). Hence it would ſeem that originally the lender was bound to ſee to the application of the money advanced by him, and that he was obliged to prove this, to entitle himſelf to recover againſt the owners. But, as the law now ſtands, if it appear that the money has been fairly and regularly lent to ſupply the neceſſities of the ſhip, the miſapplication of it by the maſter will not affect the claim of the lender, who will have his action againſt the owners, and his *lien* on the ſhip, without proving that the money was properly applied. He has no reaſon to miſtruſt the maſter, whom the owners have employed. But if he be an accomplice in any fraudulent miſapplication of the money, the owners may impeach the contract upon that ground (*c*).

Even in a foreign country the maſter can only borrow money in caſe of neceſſity.

And this muſt appear in the contract.

But the lender is not bound to look to the due application of the money.

In a former part of this work (*d*), it was ſhewn that no *Britiſh* ſubject can legally trade with the enemies of the ſtate in time of war: and that therefore an inſurance upon ſuch trading is void. It was alſo ſhewn that the inſurance of the ſhips and effects of the enemy has, on ſeveral occaſions, been prohibited by ſtatute; and many arguments and authorities have been adduced to prove that, even at common law, ſuch inſurances are illegal. It is needleſs to repeat thoſe arguments here, every one of which applies with equal, if not greater, force, to prove that the lending of money to the enemy upon bottomry is illegal, if not highly criminal.

Whether money may be legally lent on bottomry to an enemy, in time of war.

(*a*) *Molloy*, b. 2, c. 2, § 4 Laws of *Oler*. art. 1, 22.—— (*b*) ff. de exercit. art. 7, *Vinnius*, ad id. *Emerig*. t. 2, p. 434. ——(*c*) *Loccen*. l. 2, c. 6. n. 12. *Emerig*. t. 2, p. 441.—— (*d*) Sup. 85.

CHAP. III.

Of the Thing hypothecated.

Money may be lent on whatever may be inſured;

IT is a general rule that money may be lent on bottomry or reſpondentia, on whatever may be the ſubject matter of inſurance. It may be lent on the body, tackle, furniture, and proviſions of the ſhip, or upon all, or any part of the cargo; or upon both ſhip and cargo (*a*).

The borrower may take the money on board with him.

But money may be borrowed on reſpondentia without hypothecating any thing. The borrower may, and frequently does, take the money on board with him in ſpecie, in order that he may employ it in trade in the courſe of the voyage; which, as has been already obſerved (*b*), was probably the original intention of ſuch loans.

But the money, or its equivalent, muſt be expoſed to the perils of the ſea, at the riſk of the lender.

But it is of the eſſence of this contract that the money lent, or ſomething equivalent to it, be expoſed to the perils of the ſea, at the riſk of the lender. And the ſame reaſons of policy which forbid gaming inſurances equally apply to wagers in the form of bottomry loans. If the borrower have no effects on board; or having ſome, he borrow much beyond their value, and agree to pay high marine intereſt, this will afford a ſtrong ground to ſuſpect fraud, and that the voyage will have an unfortunate end. *Cum capitaneus, ad cambium recepe-rit longe majorem pecuniæ ſummam quam fuerit riſicum ſuper navi exiſtens, præſumi debit ſiniſtrum fuiſſe doloſum* (*c*).

This practice reſtrained by ſtat. 22 C. 2. c. 11.

Our legiſlature long ſince found it neceſſary to reſtrain the miſchiefs reſulting from this practice, and therefore by ſtat. 16 C. II. c. 6, re-enacted and made perpetual by the ſtat. 22 C. II. c. 11, § 12, after reciting that,

---

(*a*) *Pothier*, h. t. n. 9.——(*b*) Sup. 735, 6.——(*c*) *Caſaregis*, diſ. 62, n. 7; Vid. *Le Guidon*, ch. 19, art. 10.

"Whereas

" Whereas it often happeneth that maſters and mariners " of ſhips having inſured or taken upon bottomry, greater " ſums of money than the value of their adventure, do " wilfully caſt away, burn, or otherwiſe deſtroy the ſhip " under their charge, to the merchants and owners " great loſs;" for the prevention thereof for the future, enacts, 'That if any captain, maſter, mariner, or other 'officer belonging to any ſhip, ſhall wilfully caſt away, 'burn, or otherwiſe deſtroy the ſhip unto which he be-'longeth, or procure the ſame to be done, he ſhall ſuffer 'death as a felon.'

Wagers, in the form of bottomry contracts, are permitted in ſome parts of *Italy*.

At *Leghorn* and ſome other parts of *Italy*, where gaming inſurances are tolerated, wagers in the form of bottomry contracts are alſo allowed (*a*).—In *France*, it was the wiſe policy of the framers of the famous ordinance of 1681, to prohibit all gaming and wagering upon the events of maritime adventure; and therefore they did not only forbid all gaming inſurances, but alſo all wagers in the form of bottomry contracts. It is therefore provided (*b*) that, in caſe of loſs, the borrower upon goods ſhall not be diſcharged without proving that he had goods on board at the time of the loſs, on his own account, to the amount of the ſum lent.

They are prohibited in *France*.

The 19 G. II. c. 37, § 5, directs that, upon *Eaſt India* voyages the money ſhall only be lent on the ſhip or goods on board, with benefit of ſalvage to the lender.

In *England* it was not unuſual, before the ſtat. 19 G. II. c. 37, for perſons to borrow money *on the voyage*, as it was called; that is, where the borrower, having nothing, either in the ſhip or cargo, which he could hypothecate, took up money on his own perſonal credit, and on the credit of his ſureties, if he had any. The money thus borrowed was often taken on board, and uſually employed in ſome commercial adventure depending on the ſucceſs of the voyage; and therefore this might generally be conſidered as a legitimate loan upon reſpondentia. But the ſpirit of gaming having availed itſelf of this form of contract to cover wagers, particularly in long

(*a*) *Caſaregis*, diſc. 14, 15.—— (*b*) Ord de la mar. h t. art. 3, 14; vid. *Emerig.* t. 2, p. 496, 500; *Valin*, on art. 3, 14, h. t.

voyages, the ſtat. 19 *G.* II. c. 37, after prohibiting inſurances without intereſt, declares (§ 5.), 'That all 'money lent on bottomry or at reſpondentia, upon any 'ſhip or ſhips belonging to any of his Majeſty's ſubjects, 'bound to or from the *Eaſt Indies*, ſhall be lent only on 'the ſhip, or upon the merchandizes on board, and ſhall 'be ſo expreſſed in the condition of the bond; and the 'benefit of ſalvage ſhall be allowed to the lender, who 'alone ſhall have a right to make inſurance on the money 'ſo lent; and in caſe it ſhall appear that the value of his 'ſhare in the ſhip, or the effects on board, does not 'amount to the full ſum or ſums he has borrowed as 'aforeſaid, ſuch borrower ſhall be reſponſible to the 'lender for ſo much of the money borrowed as he has 'not laid out on the ſhip or merchandize laden thereon, 'with lawful intereſt for the ſame, in the proportion the 'money laid out ſhall bear to the whole money lent, 'notwithſtanding the ſhip or merchandize ſhall be totally 'loſt.'

Whether a wager, in the form of a bottomry loan, be a legal contract at common law.

It is ſaid (*a*) that, as *Eaſt India* voyages only are mentioned in this act, and that as *expreſſio unius eſt excluſio alterius*, it follows that bottomry loans, where the borrower has nothing on board, may be legally made in all other caſes, as at common law, except in the caſes prohibited by the ſtat. 7 *G.* I. c. 21, § 2. (*b*).

It is certainly not a little ſingular that the ſame legiſlature which thought it neceſſary to prohibit ſuch loans upon *Eaſt India* voyages, ſhould not have thought the ſame prohibition equally neceſſary in all other caſes. I cannot, however, admit the application of the maxim, *expreſſio unius eſt excluſio alterius*. If, indeed, the maxim were, *excluſio unius eſt recognitio alterius*, it might be more applicable. But ſuch a maxim would have the effect of proving, that a ſtatute which ſhould be made to reſtrain one particular abuſe, would ſanction all others of the ſame nature; which is manifeſtly abſurd. But, be this as it

(*a*) *Park*, 411.——(*b*) Vid. inf. 754.

may,

may, ſuch an inference is not ſufficient to prove that a ſpecies of gaming ſo miſchievous in its tendency, had ever been ſanctioned by the common law. Nothing ſhort of a ſolemn deciſion of one of the ſupreme courts of *Weſtminſter*, could give to ſuch doctrine the ſtamp of authority; and I believe there has not yet been ſuch a deciſion.

The ſtat. 7 *G.* I. c. 21. prohibits the lending money on bottomry on foreign *Eaſt India* ſhips.

Many *Britiſh* ſubjects having, in the reign of *George* I., fitted out ſhips and clandeſtinely traded to the *Eaſt Indies* under colour of foreign commiſſions, the ſtat. 7 *G.* I. c 21, § 2, made to reſtrain theſe practices, and to protect the monopoly of the *Eaſt India* company, amongſt other regulations, declares, 'That all contracts and agreements, 'made or entered into by any of his majeſty's ſubjects, 'or any perſon or perſons in truſt for them, for the loan 'of any money by way of bottomry, on any ſhip or ſhips 'in the ſervice of foreigners, and bound to, or deſigned 'to trade in, the *Eaſt Indies*, ſhall be void.'

Whether this act reſtrains the lending of money to foreigners trading to their own ſettlements in *India*.

It is ſaid (*a*) that this act does not mean to prevent the king's ſubjects from lending money on bottomry on foreigns ſhips, trading to their own ſettlements in the *Eaſt Indies*; and it muſt be owned that, from the preamble to the act, it would ſeem that it had only in view to reſtrain the illegal commerce of *Britiſh* ſubjects with the *Eaſt Indies*, without any reference to that of foreigners; yet the above clauſe expreſsly, and in the moſt unqualified terms, reſtrains the lending of money on bottomry on *any* ſhip or ſhips *in the ſervice of foreigners* (*b*). Whether a ſhip, the property of *Britiſh* ſubjects, fitted out by them, and laden with their merchandize, can be ſaid to be *in the ſervice of foreigners*, merely becauſe ſhe is furniſhed with a commiſſion from a foreign ſtate, is a queſtion upon which there has not yet been any judicial deciſion.

Sumner v. Green, 1 H. Bl. 301.

In the year 1789 an action was brought in the court of Common Pleas on a reſpondentia bond, executed by the defendant, an *American*, to ſecure payment for a

It would ſeem that a reſpondentia bond for money lent by a *Britiſh* ſubject upon goods on

(*a*) *Park*, 412.——(*b*) Vid. ſup. 128.

board an *American* ſhip, on a voyage from *Bengal* to *Rhode Iſland* is void.

cargo of goods ſhipped by the plaintiff, a *Britiſh* ſubject at *Calcutta*, on board an *American* ſhip, homeward bound, from *Calcutta* to *Rhode Iſland*. The ſhip had ſailed from *England* and landed a cargo of *European* goods in *Bengal*, previouſly to her taking in the cargo, on which the bond was given.—The defendant, being arreſted on the bond, moved to be diſcharged out of cuſtody on entering a common appearance, on the ground that, ſince the independence of the *United States*, an *American* ſhip was a *foreign ſhip* within the meaning of the above ſtat. 7 *G.* I. c. 21, § 2.—The court diſcharged the defendant.—Lord *Loughborough* ſaid,—"We do not think it neceſſary upon this application, to give any decided opinion upon this act; but it would be improper to hold the defendant in cuſtody, if there appear a probable ground that the contract which is the foundation of the action is void. I do not chuſe to enter into the conſtruction of the ſtatute; but I think it probable that, in its true meaning, it would reach all trading to the *Eaſt Indies* for the purpoſe of ſending goods to other parts of the world, contrary to the proviſions of the company's charter."

Money may be borrowed on freight.

By the law of *England*, freight, as we have already ſhewn (*a*), may be inſured, and conſequently it may be hypothecated upon a bottomry contract.

In *France* money cannot be borrowed on *freight*, or on *profit*.

In *France* the borrowing of money by the owners of a ſhip, on freight not earned, is prohibited (*b*). The reaſon, as *Valin* informs us (*c*), is, becauſe the lender would be at the mercy of the borrower, who would not much concern himſelf about freight, from which he could derive no profit. But it is permitted to borrow money on freight, already earned; that is, where the money borrowed is to be employed by the *affreighter*, in paying freight which he is bound to pay at all events. Freight, in that caſe, being an expence which the affreighter muſt loſe if the ſhip ſhould be loſt without completing her voyage, is a proper ſubject of inſurance, and conſequently of a bottomry loan (*d*). Nor is

(*a*) Sup. b. 1, c. 3, ſ. 6, p. 91.———(*b*) Ord. de la mar. h. t. art. 4.———(*c*) *Valin* on art. 4, h. t.———(*d*) Vid. ſup. 91, 92.

it

it permitted by the *French* law to borrow money on bottomry on the profits expected upon goods, because profit is uncertain, and has no physical or substantial existence on board (*a*).

Seamen may undoubtedly borrow money on any goods they may have on board; because, as far as relates to such goods, they are in the same situation as those of any other shipper. As to their *wages*, the same reasons of policy, drawn from the necessity of interesting them in the preservation of the ship, which prohibit their being insured, equally forbid their borrowing money on them (*b*).

Seamen may borrow money on their goods on board; but not on their wages.

Whether money may be lent on a ship or goods already exposed to the perils of the sea, is a question upon which some learned men have differed.—*Valin* (*c*) holds, that it makes no difference whether the loan be made before the ship's departure or afterwards; 'because,' says he, 'the presumption is, either that the money 'has been usefully employed in the things put in risk, 'or in paying what was due on that account.'—*Emerigon* (*d*), on the contrary, supposes that the original idea of bottomry was, that the money borrowed should be bestowed on the ship, or vested in goods for exportation (*e*); and that, upon this principle, this species of loan has been permitted and encouraged: But that, as soon as the ship sets sail the motive to this ceases; and a loan, after the ship's departure, could not be said to have purchased the goods already exposed to the perils of the sea.—This is plausible, but *Valin*'s reasoning seems the most satisfactory.

Whether money may be lent on a ship or goods already in risk.

(*a*) *Ord. de la mar.* h. t. art. 4, *Pothier*, h. t. n. 14. *Emerig.* t. 2, p. 480. Vid. sup 94. Vid. *Bynk quæst. jur priv.* lib. 4, c. 5, in which he cites a decision of the senate of *Rotterdam*, to shew that *lucrum quod speratur, per leges nauticas assecurari non posse.* ——(*b*) *Emerig.* t. 2, p 480.—— (*c*) On art. 16, tit. *de la saisie*, tom. 1, p. 346. ——(*d*) Tom. 1, p 484.—— (*e*) *Trajectitia ea pecunia est quæ trans mare vehitur:—Sed videndum an merces ex eâ pecuniâ comparatæ, in eâ causâ habeantur, et inter sit, utrum etiam ipsæ, periculo creditoris, navigent; nam sæpe trajectitia pecunia sic fit de naut. fœn.* 1

CHAP. IV.

Of the Principal, and marine Intereſt.

Of what the loan may conſiſt.

TO conſtitute this contract, one party muſt lend the other a ſum of money upon the uſual conditions. Not that this contract could only be made upon a loan of *money*; for, as a loan, it may conſiſt, according to the *Roman* law, of all thoſe things *quæ pondere, numero, et menſurâ conſtant, et quæ uſu conſumuntur* (*a*). In practice, however, ſuch loans are ſcarcely ever made but in money (*b*). *Emerigon*, indeed, mentions an inſtance of a loan of ſix dozen of *Morocco* ſkins, which were lent on *reſpondentia*, and a ſecurity given for the ſum at which they were valued, with marine intereſt at *cent. per cent.* (*c*).

The principle upon which marine intereſt is allowable.

Bottomry, as has been already obſerved, differs from a ſimple loan in this, that, in the latter, the borrower takes the riſk upon himſelf, and muſt repay the money at all events; whereas the lender on bottomry takes on himſelf the riſk ariſing from the dangers of the ſea, and is only to be repaid in the event of a ſafe arrival. He may therefore legally ſtipulate that, in the event of a ſafe arrival, he ſhall be paid, beſide the ſum lent, not only a compenſation for the *uſe* of his money, but alſo the price of the riſk. And as it is impoſſible to fix any rule by which this can be preciſely aſcertained, it muſt in all caſes be ſettled by the agreement of the parties (*d*). *Trajectitia pecunia, propter periculum creditoris; quamdiu navigat navis infinitas uſuras recipere poteſt* (*e*). *Juſtinian*, however, after prohibiting the *centeſima* (which was one *per cent. per* month, or twelve

(*a*) ff. l. 2. *de reb. cred.* § 1.——(*b*) *Pothier*, h. t. n. 8.——(*c*) *Emerig.* t. 2, p. 412.——(*d*) Vid. *Pothier*, h. t. n. 2.

(*e*) *Paul.* ſent. 3, 11, 14.

per

per cent. per annum), in ordinary caſes, permitted it in this contract, and forbid any higher intereſt (*a*). —Such a rule might have been proper in a country where navigation was confined to mere coaſting voyages, and where the principal difference between the riſk of one voyage and of another conſiſted in the time in which each might be performed. But, in modern times, when commerce is carried on between countries the moſt remote from each other, it would be impoſſible to fix any preciſe ſtandard by which the rate of marine intereſt could be properly regulated.

Legality of it.

The marine intereſt, therefore, however high or exorbitant it may ſeem, cannot be deemed uſury, provided the money lent be *bonâ fide* put in riſk. Several attempts, however, have been made to call in queſtion the legality of ſuch contracts; but, in every inſtance, the courts, both of law and equity, have held that if the principal be *bonâ fide* put in riſk, the contract is legal, however high the marine intereſt reſerved may be (*b*).—If, indeed, the form of a bottomry or reſpondentia loan be uſed as a cloak to an uſurious contract, there can be no doubt, but that it would be illegal and void.

It is only due where the riſk has been commenced.

It is of the eſſence of this contract that the ſum lent be put in riſk; and it does not, in truth, become a bottomry or reſpondentia contract, till the riſk commences. Therefore, by the *Roman* law, if the borrower had ſpent the money on ſhore, and did not expoſe it to the perils of the ſea, it was not deemed bottomry, but only a ſimple loan at common intereſt (*c*). And by the general law of merchants, at this day, the contract of bottomry, like that of inſurance, is merely *executory*, till the riſk has been commenced; and the borrower, like the inſured, may, at his pleaſure, by giving up the voyage propoſed,

If the riſk be not commenced, the contract will become a ſimple loan; even though the borrower covenant to perform the voyage.

(*a*) *Cod. lib.* 4, tit. 32, *de uſur.* 26. — (*b*). R. *Sharpley* v. *Hurrell, Cro.* J. 2. 8; Per *Doddericge*, J. in *Roberts* v. *Trenayne, Cro.* J. 508; R. in *Joy* v. *Kent, Hard.* 418; R. in *Soome* v. *Gleen*, 1 *Sid.* 27, 1 *Lev.* 54; Vid. *Dandy* v. *Turner*, 1 Eq. Ca. Ab 372; R. *De Guilder* v. *Depeiſter*, 1 *Vern.* 236; R. Anon. 2 Ch. Ca. 30.——(*c*) *ff. de naut. fen.* 1.

or

or by not ſhipping the goods on which the money was lent, prevent its ever taking effect. For, however it may have happened, that the riſk was never commenced, it is ſufficient that it has happened, to turn the contract into a ſimple loan, at common intereſt. The marine intereſt can only be due in reſpect of the principal having been actually put in riſk; nothing elſe can give the lender a legal claim to it. And this is ſo, even where the borrower covenants to perform the voyage mentioned in the contract within a limited time (*a*).

De Gelder v. *De Leijer*, 1 *Vern.* 263.

Therefore, where the borrower was bound, in conſideration of 400 l. the ſum lent, to perform the voyage mentioned in the bond, within ſix months; and alſo, at the expiration of that time, to pay the 400 l. and 40 l. premium, in caſe the veſſel arrived ſafe; and it happened that the ſhip never ſailed on the voyage, whereby the bond became forfeited.—The borrower brought his bill in equity to be relieved; and it was there decreed, that, as there had been no hazard of loſing the principal, the lender muſt give up the premium, and be content with his principal and *ordinary intereſt*.

What allowance ought to be made to the lender, where the riſk has not been commenced.

To the ſimple intereſt payable, in ſuch caſes, on the ſum borrowed, *Valin* (*b*), by analogy to the practice in caſes of inſurance, holds that one half *per cent.* upon the marine intereſt, ought to be paid by the borrower who has failed in the contract, in caſe the lender has inſured his principal.—*Emerigon* (*c*) approves of this; but adds, that if the borrower be not in fault, it will be ſufficient to repay the ſum lent, with the ordinary intereſt. To me it ſeems but reaſonable that the lender ſhould, in every ſuch caſe, receive not only his principal and intereſt, but alſo one half *per cent.* upon the marine intereſt, and all charges of inſurance.

When the riſk ceaſes, the marine intereſt ceaſes.

In general, as ſoon as the riſk ceaſes, (*diſcuſſo periculo*) either by the ſhip's ſafe arrival, the expiration of the

(*a*) *Pothier*, h. t. n. 38, 39; *Valin* on art. 15, h. t.; *Emerig.* t. 2, n. 494.——(*b*) On art. 15, h. t.——(*c*) Tom. 2, p. 496.

term, or any other event, the marine intereſt ceaſes, and the debt becomes abſolute. From that time, if the borrower delay payment, it bears only ordinary intereſt (*a*).

If the contract be for a certain number of months, either at a ſpecific ſum, or at ſo much *per* month, and ſo at that rate, for any longer time, not exceeding a fixed period; and the voyage be performed within the period firſt limited, the marine intereſt for the whole of that period, will nevertheleſs be due: But if it exceed the latter period, the riſk of the lender will ceaſe, and the debt become abſolute, though the voyage ſhould not be ended. *Poſt diem præſtitutam, et conditionem impletam, periculum eſſe creditoris deſinet* (*b*).

When the time of the riſk is limited, the riſk and the marine intereſt will end with the time, though the voyage be not ended.

And this holds, even where the ſhip has been prevented by inevitable accident from performing her voyage within the time limited.—As where money was lent on bottomry, with a condition that if the ſhip, which was bound to the *Eaſt Indies*, ſhould return to *London* within 36 months, or if ſhe ſhould not return within that time, and ſhould not be taken or loſt within that time, the money to be paid, &c. *The ſhip was detained at* Surat *in* India, *by an embargo laid by the* Mogul, *till after the* 36 *months were elapſed, and in her return home was taken*; ſo that the bond was forfeited. But there being no fault in the maſter, and the voyage being thus delayed by inevitable accident, the borrower brought his bill to be relieved againſt the penalty of the bond.—But Lord *Harcourt*, Ch. ſaid,—"I cannot relieve in this caſe, againſt the expreſs agreement of the parties.—If the lender has inſured this money upon the ſhip, the borrower ſhall have the benefit of the inſurance, upon allowing the lender the charges of the inſurance, and paying him the money in three months."

Ingledew v. *Foſter*, 4 *Vin.* Ab. 281.

And the riſk of the lender will ceaſe, though the ſhip was prevented by accident from performing her voyage within the time limited.

Emerigon puts a caſe, where it is ſtipulated that 12 *per cent.* ſhall be paid for the firſt ſix months; and that this ſhall be payable, *though the ſhip ſhould be afterwards loſt*. And he ſeems to be of opinion that, if the ſhip be loſt

If the marine intereſt be agreed to be paid for the firſt ſix months, though the ſhip ſhould be loſt; whether this be a legal contract.

(*a*) *ff. de naut. fœn.* 4.—(*b*) *ff. ut ſup.*

after

after the ſix months, the lender is not entitled to the ſix months' intereſt.—He ſays, that if the borrower had remitted the intereſt for the firſt ſix months, the lender might fairly receive it; but that, if he ſhould not, from the profits of his trade, have been enabled to do this, he would be diſcharged from all obligation (*a*).—This diſtinction is founded on principles much too vague and indefinite to be received as law. With us, the contract would not be uſurious, becauſe the ſum lent would be put in hazard; and being legal, it would be binding upon the borrower, whatever might be the ultimate ſucceſs of the adventure. In ſuch a caſe, the firſt ſix months would be conſidered as a diſtinct riſk.

Common intereſt begins to run on the principal, as ſoon as the riſk ends.

If, when the ſea-riſk is ended, the borrower delay payment, the common intereſt begins to run, *ipſo jure*, without any demand. *Diſcuſſo periculo majus legitimâ uſurâ non debebitur* (*b*). But this intereſt runs only on the principal, not on the marine intereſt; for this would be intereſt upon intereſt: *Acceſſio acceſſionis non eſt* (*c*).

(*a*) *Emerig.* t. 2, p. 518.——(*b*) *ff. de naut. fœn.* 4.——(*c*) *Pothier*, h. t. n. 51.; *Emerig.* t 2, p. 414.

CHAP. V.

Of the Perils or Riſks to which the Lender is liable.

It is eſſential to this contract that the lender run the ſea-riſk.

IT is eſſential to this contract, not only that the money be lent on a ſhip or goods, but likewiſe that theſe be expoſed to the perils of the ſea, at the riſk of the lender; that is, that the repayment of the ſum lent, and the marine intereſt, ſhall depend on the ſafe arrival of the ſhip or goods (*a*). The perils of the ſea, in a large ſenſe, comprehend all thoſe accidents and misfortunes, to which ſhips at ſea are expoſed, and which no human foreſight or precaution can avert or reſiſt; *Vis divina, quæ præcaveri, & cui reſiſti, non poteſt.* This idea ſeems to be very fully expreſſed in the uſual terms of our bottomry and reſpondentia contracts; by which it is provided that, '*if, in* '*the courſe of the voyage, and within the time preſcribed, an* '*utter loſs of the ſhip, by fire, enemies, men of war, or any* '*other caſualties, ſhall unavoidably happen,*' the bond ſhall be void, and the borrower diſcharged. So that the perils to which the lender is expoſed, are nearly the ſame as thoſe to which the underwriters upon a policy of inſurance are liable (*b*).

The perils are nearly the ſame as in inſurance.

A loſs by pirates is within the contract.

Though a loſs by pirates is not uſually expreſſed in bottomry or reſpondentia ſecurities; yet this is a riſk within the meaning of the words; piracy being one of the *caſualties* to which ſhips at ſea are liable (*c*).

(*a*) *Pothier*, h. t. n. 16, 38.——(*b*) Vid. *Le Guidon*, ch. 18, art. 2. *Valin* on art. 11, h. t. and on art. 6, tit. *des aſſurances*; *Pothier*, h. t. n. 16. Vid. ſup. 487.——(*c*) R. in *Barton* v. *Wolliford*, *Comb.* 56. But this was not a queſtion upon a bottomry contract, as has been ſuppoſed. *Park* 421. It aroſe in an action on a bill of lading, to which the defendant pleaded piracy; and upon demurrer to this plea, it was contended, that robbery is no more an excuſe to a maſter of a ſhip than to a common carrier: But the court held that piracy was an excuſe in this caſe, being one of the dangers of the ſeas.

Nothing ſhort of a total loſs will diſcharge the borrower.

But whatever may be the perils to which the lender is liable,—nothing ſhort of a total loſs will diſcharge the borrower. The obligation remains, however the goods may be damaged by the perils of the ſea. Nor is there any deduction on account of ſuch damage; for the lender is not bound to contribute to ſimple average or particular damage, unleſs by expreſs agreement. In this reſpect, the lender on bottomry is in a better ſituation than an inſurer, who is obliged to indemnify the inſured, to the extent of the ſum inſured, from all damage ariſing from any of the perils inſured againſt. A capture, therefore, to have the effect of diſcharging the borrower, muſt be ſuch a taking and detention as would amount to a total loſs in a caſe of inſurance: A mere temporary detention will not diſcharge the borrower, unleſs the voyage be thereby loſt.

Jones v. Wilkinſon, B. R. Mich. 23 *G.* III. MS.

Thus:—An action was brought on a bottomry bond, on a voyage from the *Tagus* to *New York*; and the condition of the bond was, that if, upon the ſhip's arrival at *New York*, the defendant ſhould pay the plaintiff the ſum lent, with the ſtipulated intereſt; or if the ſhip ſhould be loſt, taken by the enemy, miſcarry, or be caſt away, the bond to be void, otherwiſe to remain in force.—The defendant pleaded, 1ſt, *Non eſt factum*; 2dly, that the ſhip did not arrive ſafe at *New York*; 3dly, that the ſhip was captured by the enemy.—Iſſue was joined upon the two firſt pleas; and to the third the plaintiff replied recapture. Iſſue being joined on this replication, it appeared upon the trial, that the ſhip was taken on her paſſage to *New York*, detained for a month, and plundered of her ſtores; that ſhe was then retaken by an *Engliſh* privateer, and carried into *Halifax*; where the court of admiralty decreed that ſhe ſhould be reſtored to the original owners, on payment of ſalvage, which was raiſed by ſale of part of the cargo; that after a conſiderable repair there, ſhe ſailed for *New York*, where ſhe arrived with the remainder of her cargo, and earned her freight: That the ſhip and freight were then worth the ſum mentioned in the bond; but not worth that

A ſhip is captured and detained for a month, recaptured and carried to a port out of the courſe of the voyage, reſtored on payment of ſalvage, and at laſt arrives at her port of deſtination: The borrower is not diſcharged.

ſum, and the ſum laid out in repairs.—There was a verdict for the plaintiff, and the court, upon a motion for a new trial, determined that the verdict was right, and the plaintiff entitled to recover.—Lord *Mansfield*, in delivering the opinion of the court, ſaid;—" It is clear that, by the law of *England*, upon a bottomry contract, there is *neither average nor ſalvage*. It has been contended on the part of the defendant, that this caſe is within the ſaving words, that in caſe of loſs by *capture*, the bond ſhould be void; and that here was a capture and detention for a month. But, upon conſideration, we are all of opinion, that a taking, within this condition, does not mean a temporary taking, which is only an obſtruction which may laſt for a day, it muſt be ſuch a taking as, between inſurer and inſured, would amount to a *total loſs*. But this was not ſuch a capture. The voyage was not loſt; for the ſhip arrived at her port of deſtination and earned her freight: And, as freight depends on the ſafety of the ſhip, ſhe muſt have *arrived ſafe* to have earned her freight. Either way there muſt be a hardſhip; but the law allows no average or ſalvage in bottomry bonds."

The lender is not liable for loſs proceeding from the internal defect of the thing, unleſs by expreſs ſtipulation.

No loſs will have the effect of avoiding the contract, or diſcharging the borrower, but a total loſs proceeding from the perils of the ſea, during the voyage, and within the time ſpecified in the contract. *Creditor ſubit periculum navigationis in caſibus fortuitis tantum* (*a*). But no loſs ſhall be reputed to have ariſen from the perils of the ſea, which aroſe from the internal defect of the thing hypothecated. As where a ſhip is not ſea-worthy, and periſhes from age, rottenneſs, or other ſuch cauſe; or where goods periſh of themſelves, liquors run out through the defect of the caſks; dry goods heat and ferment by length of time (*b*), &c. *Valin* (*c*) ſeems to condemn,

(*a*) *Roccus* de navib. n. 51 —(*b*) *Ord de la mar.* h. t. art. 12 *Emerig.* t. 2, p. 509. *Pothier*, h. t. n. 34.——(*c*) On art. 12, h. t.

as illegal, any clauſe by which the lender is made liable for loſs occaſioned by the internal defect of the thing: But *Emerigon* (*a*) holds, that the lender may, by expreſs ſtipulation, make himſelf liable for ſuch loſſes, provided the cauſe did not exiſt before the ſhip's departure.

He is not liable for the act of the owners or maſter of the ſhip.

The act of the owners of the ſhip, of the maſter, or of the borrower, is not a peril at the riſk of the lender. *Quia ſuſcipit in ſe periculum navigationis, ſuſcipit periculum fortunæ, non culpæ* (*b*). As if the voyage be changed by order of the owners of the ſhip; or if a loſs happen by the barratry of the maſter, or by the miſconduct of the merchant; this will not diſcharge the borrower. *Si infortunium vel naufragium, ex culpa debitoris proceſſerit, tunc creditor non tenetur de periculo et damno in quod incurritur, ex culpa vehentis aut alterius* (*c*). This is the general rule; but, by expreſs ſtipulation, the lender may be made liable for every loſs not occaſioned by the act of the borower (*d*).

Nor for a loſs by ſmuggling, unleſs he was privy to it.

If the ſhip be forfeited, or the goods confiſcated, for ſmuggling, in which the lender had no concern, he is not liable for the loſs; for this does not ariſe from the perils of the ſea, but from the impatient avarice and lawleſs temerity of the borrower. *Non ex marinæ tempeſtatis diſcrimine, ſed ex præcipiti avaritiâ, et incivili debitoris audaciâ* (*e*).—Yet it is ſaid, that if the lender were privy, and conſenting to the contraband trade in which the money was to be employed, he ſhall be liable for the loſs. *Si ſciente, et conſentiente illo fiat, conſenſus jus facit* (*f*).—In *England* if the money were lent to be employed in a trade prohibited by law; the contract would be abſolutely void; and the ſum lent could never be recovered from the borrower, even though no loſs had happened (*g*).

If the ſhip do not ſail on the

The lender, like an inſurer, is only anſwerable for

(*a*) Tom. 2, p. 509.——(*b*) *ff. de nant. fan.*——(*c*) *Roccus de navib.* n. 51.——(*d*) Vid. *Emerig.* t. 2, p. 510.——(*e*) *ff. de naut. fœn.* 3.——(*f*) *Kuricke*, tit. 6, p. 762. Vid. *Valin* on art. 12, b. t.—— (*g*) Vid. ſup. book 1, ch. 3, § 1, 2.

loſſes

loſſes which happen within the time and place of the riſk, as ſpecified in the contract. Therefore, if the ſhip, without neceſſity, deviate from the voyage deſcribed in the bond, the lender will not be liable, any more than an inſurer, to any loſs that may afterwards happen (*a*). Upon this point I would refer the reader to the ſubject of deviation, in caſes of inſurance (*b*), the doctrine of which is equally applicable to the preſent ſubject.

voyage deſcribed, or deviate without neceſſity, the lender will be diſcharged from the riſk.

Our courts, both of law and equity, have adopted the ſame principle in ſeveral inſtances.

Thus:—The plaintiff lent 500 l. upon the hull of a ſhip, and the defendant covenanted to pay, if the ſhip went from *London* to *Bantam*, and returned from thence directly to *London*, within 12 months, 550 l.; if from *London* to *Bantam*, and from thence to *China* or *Formoſa*, and returned to *London* within 24 months, 650 l.; and if ſhe returned not within 24 months, then to pay 5 l. *per* month above the 650 l., till 36 months; and if ſhe returned not within 36 months, then to pay 710 l. unleſs it could be proved that the ſhip was loſt within the 36 months.—The ſhip went from *London* to *Bantam*, and from thence to *Surat* and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London*, was loſt within 36 months.—In an action upon the bond; after a ſeries of long and intricate pleadings, the above facts appeared upon demurrer.—The court inclined to think, that, by reaſon of the deviation in going to *Surat*, the plaintiff was diſcharged from the riſk, and therefore entitled to recover; and after time taken to deliberate, they adjudged accordingly (*c*).

Wa[illegible] v. Wildy, *Skin.* 152.

A ſhip is loſt after a wilful deviation, the lender is not liable.

So, where, to an action upon a bottomry bond, the defendant pleaded, that the ſhip went from *London* to *Barbadoes*, *ſine deviatione*, and afterwards, on her return from *Barbadoes* towards *London*, ſhe was loſt *in viagio*

Williams v. Stedman, *Skin.* 345; *Holt's* Rep. 126. S. C.

If the ſhip be preſſed into the King's ſervice, this will excuſe a deviation; but if the borrower allege a deviation, this muſt be explicitly denied.

(*a*) *Pothier*, h. t. n. 18. *Emerig.* t. 2. p. 522.——(*b*) Sup. 183.——(*c*) Vid. Anon. 1 Eq. Ca. Abr. 372. 2 Ch. Ca. 130.

prædicto. The plaintiff replied, that the ſhip, in her return, went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe ſailed from *Jamaica* for *London*, and was loſt; and ſo ſhews a deviation: The defendant rejoined, that ſhe was preſſed into the King's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; *abſque hoc*, that ſhe deviated after ſhe was preſſed. Upon demurrer to this rejoinder, the plaintiff had judgment.—The court held that the plea of the defendant was not good; for he alleged that the ſhip went from *London* to *Barbadoes*, without deviation, and that, in her return from *Barbadoes* to *London*, ſhe was loſt *in the voyage aforeſaid*; but did not ſhew, *without deviation*. And as the condition was ſo in expreſs words, the defendant ought to have ſhewn expreſsly that he had performed it according to the words.

Changing the ſhip without neceſſity, diſcharges the lender.

So where money is lent on goods, on board a certain ſhip, the lender is only conſidered as liable for the riſk on thoſe goods while they are on board that ſhip; and if they be removed to another ſhip, without neceſſity, the lender will be diſcharged (*a*).—But if the change be occaſioned by any neceſſity, he will ſtill continue liable. As if the firſt ſhip be preſſed into the king's ſervice, or be declared unnavigable, &c.; the borrower may load the goods on board another veſſel at the riſk of the lender, and the increaſe of freight, &c. will be a general average, to which the lender will be liable (*b*).

Duration of the riſk.

Money is generally lent for the whole voyage outward and homeward; or for either ſeparately; or for a limited time. The contract uſually ſpecifies the commencement and end of the riſk; and any misfortune happening before or after, is at the riſk of the borrower (*c*). If the voyage be deſcribed in the bond; but

(*a*) *Pothier*, h. t. n. 18; *Emerig.* t. 2, p. 524 —— (*b*) *Emerig.* ut ſup. Vid. ſup. book 1. ch. 5, § 2. —— (*c*) Vid. *Valin*, on art. 13, h. t. *Emerig.* t. 2, p. 514.

the

the time of the commencement and end of the riſk be not ſpecified, the riſk, as to the ſhip, ſhall commence from the time ſhe ſets ſail, and continue till ſhe anchors in ſafety at her port of deſtination; and, as to goods, from the time they are ſhipped, till they are ſafely landed (*a*).

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the riſk during the homeward voyage on the goods, by which thoſe have been replaced on which the money was lent (*b*).

(*a*) Vid. ſup. book 1, ch. 7, § 5.—(*b*) *Pothier*, h. t. n. 34.

CHAP. VI.

Whether the Lender be liable to general Average.

By the general law of merchants, the lender is liable to general average.

THERE is this difference between inſurance and bottomry, that an inſurer, unleſs he ſtipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unleſs by expreſs ſtipulation: But, by the general law of merchants, in caſe of *groſs* or *general* average, the lender ſhall contribute to diſcharge the borrower (*a*); The reaſon of this difference is, that particular average in no degree contributes to the ſafety of the ſhip; whereas it is to thoſe ſacrifices which are the ſubject of general average, that the lender owes the preſervation of his money, which, without ſuch ſacrifices, would be loſt with the ſhip (*b*).

The nature of the contract ſeems to require this.

Foreign writers even hold that a ſtipulation on the part of the lender, to be free of general average, would be abſolutely void, as being inconſiſtent with the nature of the contract, contrary to good policy, and injurious to the intereſts of the lender himſelf, who muſt loſe all, if the ſhip be loſt (*c*). Indeed the nature and object of bottomry contracts, ſeem, of themſelves, to require that

---

(*a*) '*L'argent à profit n'eſt contribuable en aucune avarie, reſervé qu' aux rachapts, compoſitions, et jets faits pour la ſalvation du total, et pour le ſoulagement ou l'évaſion, des dangers.*' *Le Guidon*, ch 19, art. 5.—'*Ce qui eſt fort juſte*,' ſays *Cleirac*, in his commentary on this paſſage, '*afin que cette groſſe uſure paſſe au paroiſſe*, Penſatio vel œquamentum periculi, *comme dit* Du Moulin, *ſur la loi*, periculi pretium. Dig. de nautico fœnore, *en ſon traité*, Contract. uſur. *quæſt.* 3. de trajectitiis. *L'argent a profit ne charge pas le navire mais l'affecte par hypothéque, laquelle ne ſubſiſte que par la ſalvation d'iceluy; c'eſt pour quoy il eſt raiſonnable que la dite hypothéque contribuè à ce qui concerne la conſervation du total, ou de ſon ſujet*, Ut omnium in tributione ſarciatur quod pro omnibus datum eſt.' Vid. *Pothier*, h. t. n. 42, 47.——(*b*) *Emerig.* t. 2, p. 505.—— (*c*) Conſult on this point *Valin*, on art. 16, h. t.; *Pothier*, n. 46; *Emerig.* t. 2, p. 505.

the lender ſhall be liable for general average. The borrower generally takes up the money becauſe he has not a capital of his own upon which he can carry on his trade. Knowing that it would be impoſſible for him to repay the ſum borrowed, but in the event of a fortunate return, he means to run no riſk, and agrees to part with a large ſhare of his profits, to be free from all perſonal reſponſibility. But if he ſhould be held liable to general average, then, by taking up money in this way, he muſt engage in a game of hazard, perhaps without being aware of his danger, in which he may eventually be ruined.

Whether by the law of *England*.

It has been ſaid, however, by a very diſtinguiſhed judge, that, "*by the law of* England, *there is neither average nor ſalvage upon bottomry contracts* (*a*)" And this doctrine, ſo far as it relates to average, has been ſince adopted by another noble perſon, no leſs eminent for his learning and abilities (*b*). I have anxiouſly ſought, however, but ſought in vain, to find any decided caſe, or authority in the law, which could warrant this doctrine.—I cannot agree with a learned writer (*c*) on this ſubject, that the ſtat. 19 *G.* II. c. 37, § 5 (*d*), which provides that the benefit of ſalvage ſhall be allowed to the lender, on *Eaſt India* voyages concluſively proves that there was neither average nor ſalvage upon bottomry contracts at common law.—I never could look upon that act as having introduced any new principle into the law either of inſurance or bottomry contracts. On the contrary, it ſeems to me, after the beſt conſideration I have been able to give the ſubject, that it merely reſtored them to their original and only proper uſe, from which a ſpirit of gaming had been ſuffered to pervert them. I cannot even admit that, becauſe the ſtatute gives the benefit of ſalvage to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law. As well might it be ſaid, that becauſe the inſurance of enemy's property, in time of war,

(*a*) Per Lord *Mansfield*, in *Joyce* v. *Williamſon*, ſup. 754.——
(*b*) Per Lord *Kenyon* at N. P. in *Walpole* v. *Ewer*, inf. 762.——
(*c*) *Park*, 423.——(*d*) Sup. 128.

has

has been occaſionally prohibited by ſtatute, therefore the inſurance of enemy's property is a legal contract at common law (*a*).—But even admitting the inference, that becauſe the ſtatute gives the *benefit of ſalvage* to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law; does it from thence follow that he was not liable to *general average* at common law? The ſtatute no where mentions general average.

If the inſured upon a reſpondentia intereſt on a foreign ſhip be obliged to contribute to a general average, the underwriters will be liable.

But whatever may be the true rule of law which ought to prevail on this ſubject, it has been determined, that if an inſurance be made in *England* upon a reſpondentia intereſt upon a *foreign ſhip*, and it appear that the lender is liable by the law of the country to which the ſhip belongs, to contribute to a general average; the underwriters upon the policy will be liable for ſuch contribution.

Walpole v. *Ewer*, at N. P. after Tr. 1789.

Thus:—Where a reſpondentia loan on a *Daniſh* ſhip and goods was inſured in *England*, and an average loſs was ſuſtained upon the goods to the amount of 61. 15 s. *per cent.* to which the holder of the reſpondentia bond was obliged to contribute. He brought his action againſt the *Engliſh* underwriters to recover the amount of this contribution.—Lord *Kenyon*, who tried the cauſe, ſaid,—"By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes; but is entitled to receive the whole ſum advanced, provided the ſhip and cargo arrive at the port of deſtination. The plaintiff contends that as, by the law of *Denmark*, ſuch lenders are bound to contribute to average loſſes, according to the amount of their intereſt, the inſurer here muſt anſwer to them. The *Daniſh* conſul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of ſeveral men of eminence in that country have been offered on each ſide: But I reject them, becauſe the ſolemn deciſion of a court of competent juriſdiction is of much greater weight than the

The deciſion of a foreign court of competent juriſdiction is the beſt evidence to ſhew what the law of the country is.

(*a*) See this ſubject fully conſidered, ſup. book 1, ch. 2, § 1.

opinions

opinions of advocates, however eminent, or even the extrajudicial opinions of the moſt able judges. It ſeems as if, in this caſe, the underwriters were bound by the law of the country, to which the contract relates."—The jury found a verdict for the plaintiff (*a*).

(*a*) Vid. the caſe of *Newman* v. *Cazalet*, *Beawes* lex merc. 349, where an inſured had been obliged by the judgment of a foreign court to pay a larger average contribution than by the law of *England* could have been demanded, but it appeared to have been cuſtomary in adjuſting loſſes to allow the whole of ſuch contributions; Mr. Juſtice *Buller* at N. P. ruled that if the uſage were clearly proved, it ought to govern.

CHAP. VII.

Whether the Lender be entitled to the Benefit of Salvage.

The ſtat. 19 G. 2. c. 37, gives the benefit of ſalvage to lenders on *Eaſt India* voyages.

THE proviſion of the ſtat. 19 *G.* II. c. 37, which gives the benefit of ſalvage to lenders on bottomry and reſpondentia, being confined to *Eaſt India* voyages, it may be proper here to enquire, whether, before that act, the lender, upon any voyage, was entitled to the benefit of ſalvage.

Whether the lender on other voyages be entitled to the ſame benefit.

By the general law of merchants, the event upon which the borrower is diſcharged, is the total loſs of the ſhip or goods upon which the money is lent; provided this happen by the perils mentioned in the contract. Though the borrower is bound to pay the ſum lent and the marine intereſt, in caſe the ſhip or goods on which the money is lent arrive at the port of deſtination, however damaged or reduced in value by the perils of the ſea; yet if part ſhould be captured or loſt, the borrower is only bound to pay in proportion to what remains (*a*).—Thus, if 1000 l. be lent on goods, the half of which are loſt, the reſt ſaved, the lender will loſe 500 l. of his principal, and the borrower will pay the remaining 500 l. with the marine intereſt upon that ſum. If the ſhip be loſt, but the goods, on which the money was lent are all ſaved, the contract will remain in force, and the borrower will be liable, provided another ſhip can be procured to convey the goods to the place of their deſtination. But the charge of the other veſſel will be at the expence of the lender, and if no other can be procured, the borrower will be diſcharged on accounting to the lender for the proceeds of the goods ſaved.

(*a*) *Pothier*, h. t. n. 47.; *Valin*, art. 11, 14, 17, h. t. *Emerig.* t. 2, p. 453. Conſult on this point *Bynk. quæſt. jur. prlv. lib.* 3, c. 16.

But,

But, by the law of *England*, according to the opinions of Lord *Mansfield* and Lord *Kenyon*, which we have already had occaſion to refer to (*a*), *there is neither average nor ſalvage upon bottomry contracts:* It muſt be admitted, however, that, without the benefit of ſalvage, this contract muſt partake greatly of the nature of a wager, even when the money is lent upon goods on board of equal value. If there be a total loſs of the ſhip the lender loſes all, though all the goods are ſaved.

Lord *Mansfield's* opinion againſt it.

(*a*) Sup. 761.

As to the inſurance of bottomry and reſpondentia loans, vid. ſup. 117, 317.

As to the remedy of the lender, where the borrower becomes bankrupt, before the riſk is ended, and the lender entitled to repayment, vid. ſup. 731.

END OF THE SECOND BOOK.

BOOK THE THIRD.

Of Insurance upon Lives.

The subject of this book may be distributed under the following heads;

I. *Of the Nature of this Contract.*
II. *Of the Warranty of the Age and Health of the Life insured.*
III. *Of the Interest of the insured.*
IV. *Of the Risks.*

CHAP. I.

Of the Nature of this Contract.

Defined. THE insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum, or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or an annuity equivalent, upon the death of the person whose life is insured, *whenever this shall happen*, if the insurance be for the whole life, or, *in case this shall happen within a certain period*, if the insurance be for a limited time.

Utility of it. The precarious dependence of a numerous family upon the life of a single person, naturally suggests the idea of seeking some protection against a calamity, which sooner or later must befal them; and this, probably, suggested the first idea of insurances upon lives, as an expedient by which a pecuniary indemnity, at least, might be secured to the sufferers sufficient to rescue them from the poverty and distress which otherwise awaited them.

Upon this principle rests the utility of insurances upon lives. Persons having incomes determinable upon their own lives, or the lives of others, arising from landed property, from professions, from church livings, from public

public employments, penſions, annuities, &c. by paying ſuch an annual premium as they can ſpare from their preſent neceſſities, may ſecure to their widows, their children, or other dependants, an adequate ſum of money, or an equivalent annuity, payable upon their deaths. By ſuch inſurances, alſo, may the fines to be paid upon the renewal of leaſes, or upon the deſcent of copyholds, be provided for. So, where a perſon, having only a life income, wants to borrow money, but can only give his own perſonal ſecurity for it; he may, by inſuring his life, ſecure to the lender the repayment of his money, though he ſhould die before he is enabled to diſcharge the debt (*a*).

Eſtabliſhment of the different companies for the inſurance of lives.

Amicable Society.

Theſe conſiderations induced the biſhop of *Oxford* and ſeveral other benevolent perſons in the reign of Queen *Ann*, to apply for the charter by which the corporation, called the *Amicable Society*, was eſtabliſhed; to enable perſons to ſubſcribe a part of their incomes, in order that the repreſentative of each ſubſcriber ſhould, upon his death, receive ſuch a ſum as the funds of the corporation would enable them to pay, upon the ſeveral deaths happening in each year.

Royal Exchange and *London Aſſurance* companies.

Equitable Aſſurance.

But as the benefits of this ſociety were confined to a limited number of ſubſcribers, and thoſe only for ſmall ſums, ſeveral other corporations and companies upon more extenſive plans have been eſtabliſhed.—The *Royal Exchange* and *London Aſſurance* companies obtained charters from king *George* I. to enable them to make inſurances upon lives. The Society for *Equitable Aſſurances* on lives and ſurvivorſhips, was eſtabliſhed in the year 1762, by deed inrolled in the court of King's Bench at *Weſtminſter*, in which every perſon who inſures becomes a member, participating in the profit and loſs of the ſociety. The ſucceſs attending this eſtabliſhment has given riſe to many other inſtitutions of the ſame nature, in the country as well as in the metropolis; but all greatly inferior to

(*a*) Vid. inf. ch. 3.

the

the *Equitable Assurance*, in the extent of their dealings, and the magnitude of their funds.

Legality of insurance on lives.

We are not informed at what time this species of insurance was first introduced into this country; probably because it came into use by slow and imperceptible degrees. *Roccus* (*a*) has taken some pains to prove that insurances upon lives are legal contracts. Yet in most of the states of *Europe* such insurances have been prohibited by positive law. In this country, however, such contracts have been repeatedly sanctioned by legislative authority, and indeed the legality of them is now indisputable. Perhaps it might savour too much of national partiality to assert that in this country alone can insurances upon lives be safely tolerated. In *France*, they have always been deemed illegal (*b*), and they are expressly prohibited by the ordinance of 1681 (*c*), because, say the *French* writers, it is an offence against public decency to set a price upon the life of a man, particularly the life of a freeman, which is above all valuation (*d*); thus glossing over, with a fine sentiment, a motive of policy which could not be mentioned without conveying an insinuation to the discredit of the national character.

(*a*) *De assecur.* n. 74.——(*b*) *Le Guidon*, ch. 16, art. 5.——(*c*) Tit. *des assurances*, art. 10.——(*d*) *Valin*, on art. 10. tit. *des assurances*. Vid. sup. 215; *Pothier*, tit. *des assurances*, n. 127.

CHAP. II.

Of the Warranty of the Age and Health of the Life insured.

IT is generally a condition, or warranty, in an insurance upon a life, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured has not any disorder which tends to the shortening of life; that he has, or has not, had the small pox; and that his age does not exceed a certain period; that this declaration shall be the basis of the contract between the insurers and the insured; and that if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited.

The declaration signed by the insured.

As this declaration is to be taken as part of the written contract (*a*), amounting to a warranty, it behoves every person who makes an insurance upon a life, to be very circumspect in ascertaining the truth of the allegations contained in it; because upon that the validity of the contract must depend.

By the warranty that the person, whose life is to be insured, '*has no disorder which tends to the shortening of life*,' is not to be understood that he is perfectly free from the seeds of all disorder. The warranty is sufficiently true if he be in a reasonably good state of health, and, that his life may be insured on the common terms, for a person of his age and condition: And the following case will shew, that though he labours under a particular infirmity, yet, if it can be shewn that this had no

A warranty that the party is in good health will not be falsified by proving that he laboured under a particular infirmity; if this had no tendency to shorten life.

(*a*) See the case of *Routledge* v. *Burrell*, inf. book 4, c. 4.

tendency to ſhorten life, and that, in fact, it did not, in any degree, contribute to his death, the warranty is ſufficiently true.

Roſs v. *Bradſhaw*, 1 *Bl.* 312.

The life inſured is warranted in good health at the time of making the policy; —It will not falſify this warranty, that, in conſequence of a wound, he had a partial palſy in his loins; if this did not tend to ſhorten life.

Thus:—An inſurance was made on the life of Sir *James Roſs* for one year from *October* 1759 to *October* 1760; *warranted in good health at the time of making the policy.*—In an action on this policy, it appeared upon the trial, that Sir *James* had received a wound at the battle of *La Feldt*, in the year 1747, in his loins, which had occaſioned a partial relaxation or palſy, ſo that he could not retain his urine or *fæces*, and which was not mentioned to the inſurer. Sir *James* died of a *malignant fever* within the time of the inſurance. All the phyſicians and ſurgeons who were examined for the plaintiff, ſwore that the wound had no ſort of connexion with the fever; and that the want of retention was not a diſorder which ſhortened life; but he might, notwithſtanding that, have lived to the common age of man; and the ſurgeons who opened him ſaid that his inteſtines were all ſound. One phyſician, who was examined for the defendant ſaid, that the want of retention was paralytic; but being aſked to explain, he ſaid it was only a local palſy, ariſing from the wound, but did not affect life: But, on the whole, he did not look upon him as a good life.—Lord *Mansfield*, who tried the cauſe, in ſumming up the evidence to the jury, ſaid;—"No queſtion of fraud can exiſt in this caſe. When a man makes an inſurance upon a life generally, without any warranty of the ſtate of the life inſured, the inſurers take all the riſk, unleſs ſome fraud be committed by the perſon inſuring, either by *ſuppreſſing ſome circumſtances, which he knew*, or by *alleging what was falſe.*" But if the inſured knew no more than the inſurer, the latter takes the riſk. Wherever there is a warranty, it muſt, at all events, be proved that the party was a

hich makes the queſtion on a warranty
than on fraud. Here there was a war-
t is proved that there was no repreſentation
the ſtate of the life, nor any queſtion aſked

about it: Nor was it neceſſary. Where an inſurance is upon a *repreſentation*, every material circumſtance ſhould be mentioned; ſuch as age, way of life, &c. But where there is a warranty, then, nothing need be told; but it muſt, in general, be proved, if litigated, *that the life was, in fact, a good one: And ſo it may be, though he had a particular infirmity.* The only queſtion is, whether he was in *a reaſonaby good ſtate of health, and 'ſuch a life as ought to be inſured on common terms.*"—The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

So, where an inſurance was made on the life of Sir *Simeon Stuart*, from the 1ſt of *April* 1779, to the 1ſt of *April* 1780, and during the life of *Eliza Edgley Ewer*. The policy contained a warranty that Sir *Simeon* was about 57 years of age, and in good health when the policy was underwritten, and that Mrs. *Ewer* was about 78 years of age. Two queſtions were intended to have been made; 1ſt. As to the plaintiff's intereſt; 2dly. On the warranty of health. The former was diſpoſed of by the plaintiff's proving a judgment debt.—As to the latter, it appeared in evidence that though Sir *Simeon* was troubled with ſpaſms and cramps, from violent fits of the gout, he was in as good a ſtate of health when that policy was underwritten, as he had enjoyed for a long time before. It was alſo proved by the broker who effected the policy, that the underwriters were told that Sir *Simeon* was ſubject to the gout.—Doctor *Heberden*, and other gentlemen of the faculty proved that ſpaſms and convulſions were ſymptoms incident to the gout.—Lord *Mansfield*, who tried the cauſe, ſaid;—"The imperfection of language is ſuch, that we have not words for every different idea; and the real intention of the parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*; to others, *in good health*; and yet there was no difference, in point of fact: *Such a warranty can never mean, that a man has not in him the ſeeds of ſome diſorder.* We

White v. *Poole*, at N. P. after *Eaſt* 1780.

Nor will it falſify this warranty to ſhew that the party was troubled with ſpaſms and cramps, from violent fits of the gout.

are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured (*a*), if he has no sickness at the time, to make it an unequal contract."—There was a verdict for the plaintiff.

If there be no warranty, the insurer takes the risk upon himself.

When there is no warranty the insurer takes the risk upon himself, whatever may be the state of health of the person whose life is insured, unless there be some fraudulent misrepresentation or concealment.

Stackpool v. *Simon*, at N. P. Hil. Vac. 1779. *Park.* 437.

Thus:—An insurance was made on the life of *Drury Sheppey*, from the 1st of *April* 1777, to the 1st of *April* 1778.—In an action on the policy, the question was, as to the representation of *Sheppey*'s health, at the time the policy was effected. The interest in the life was a debt of 900l. due from *Sheppey* to the plaintiff. It appeared that *Sheppey*, who had a place in the custom house of *Ireland*, went to the south of *France*, for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker who effected the policy, told the underwriters, that the gentleman for whom he acted would not warrant any thing; but *from the account he* (the broker) *had received, he believed it to be a good life*.—Lord *Mansfield*, who tried the cause, said;—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. When there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first (*b*); and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the

The insured refuses to warrant, but the broker tells the first underwriter, that, *from the account he had received, he believed it to be a good life*.—There being no fraud in this, the underwriters run all risks.

Every subsequent underwriter may give in evidence any representation made to the first.

(*a*) It is now a practice, in most of the offices for insurances upon lives, to require that, in the proposal for every insurance, it shall be stated, whether the person, whose life is to be insured, has ever been afflicted with the gout.——(*b*) Vid. sup. b. 1, c. 10, § 1.

first.

firſt. The broker here does not pretend to any knowledge of his own, but ſpeaks from *information* (*a*). There is no fraud in him.—The jury found a verdict for the plaintiff.

(*a*) It is not ſtated, in the above note, from what information he ſpoke; but if it had appeared that he ſpoke without any information on the ſubject, this, I conceive would have been a miſrepreſentation that would have avoided the contract. Vid. ſup. . b. 1, c. 10, § 1.

CHAP. III.

Of the Interest of the Insured in the Life insured.

Necessity of prohibiting insurances upon lives, without interest.

THE spirit or gaming, which is always ready to insinuate itself into every transaction, and to assume the form of every contract, which depends upon uncertain events, long since availed itself of insurance upon lives, as affording abundant opportunities for speculating upon chances. Wagers came to be daily made upon the duration of men's lives, in the form of insurances, by persons who were neither connected with the parties, nor in any manner interested in the duration of their lives; nor did the insurers much concern themselves to know upon what interest, or for what reason, such insurances were made. Such practices were big with mischiefs of various descriptions; nor is it probable that even the lives, thus presumptuously insured, were always free from danger. The evil, however, at length became apparent to the legislature: But it being admitted, that insurances upon lives, under proper restrictions, might, in many instances, be highly beneficial to the public, it was determined, that such insurances ought not to be abolished, but only regulated.

By 14 *G.* III., c. 48, any insurance made on any life, or other event, wherein the insured shall have no interest, shall be void.

Therefore, by stat. 14 *G.* III. c. 48, § 1., it is enacted, 'That no insurance shall be made by any person 'or persons, bodies politic or corporate, *on the life or* 'lives of any person or persons, or *on any other event or* 'events whatsoever (*a*), wherein the person or persons, for 'whose

(*a*) The title of this statute is, 'An act for regulating 'insurances upon lives, and for prohibiting all such insurances, 'except in cases where the persons insuring shall have an in- 'terest

'whoſe uſe or beneſit, or on whoſe account, ſuch policy or policies ſhall be made, *ſhall have no intereſt, or by way of gaming or wagering:* And that every inſurance made contrary to the true intent and meaning of this act, ſhall be null and void to all intents and purpoſes whatſoever.'

And the name of the perſon intereſted in the event ſhall be inſerted in the policy.

And (by § 2), it is further enacted, 'That it ſhall not be lawful to make any policy or policies on the life or lives of any perſon or perſons or other event or events; without inſerting in ſuch policy or policies, the name or names of the perſon or perſons intereſted therein, or for what uſe, beneſit, or on whoſe account, ſuch policy is ſo made or underwrote.'

And the inſured ſhall recover no more than the *amount or value* of his intereſt.

And (by § 3,) it is further enacted, 'That in all caſes, where the inſured hath an intereſt in ſuch life or lives, event or events, no greater ſum ſhall be recovered, or received from the inſurer or inſurers, than the *amount or value* of the intereſt of the inſured in ſuch life or lives, or other event or events.

This act not to extend to marine inſurances.

The fourth ſection contains a proviſo that this act ſhall not extend to inſurances *bonâ fide* made on ſhips or goods.

A creditor has an inſurable intereſt in the life of his debtor.

Very few queſtions have ariſen upon the intereſt of the inſured, in the life inſured.—A *bonâ fide* creditor has undoubtedly an intereſt in the life of his debtor, at leaſt where he has only the perſonal ſecurity of the debtor; and it has been holden by a great authority, that this intereſt is inſurable within the ſtatute.

'tereſt in the life or death of the perſons inſured.'—From this title it would ſeem, that the framers of this bill originally intended to confine the operation of it to inſurances upon lives only. But the words, '*or any other event or events whatſoever*, introduced not only into the enacting parts, but alſo into the preamble, plainly ſhew that the legiſlature meant, that the regulations of this act ſhould extend to every ſpecies of inſurance, except marine inſurances; to which, by the proviſo in the 4th ſection, it is declared that it ſhall not extend.—Accordingly, in the caſe of *Roebuck* v. *Hammerton*, *Cowp.* 737, the court held that a policy upon the ſex of the chevalier *D'Eon* was a wagering policy, and void by this act.

Anderson v. *Edie*, at N. P. B. R. Hil. 1795. *Park* 430.

Thus:—An insurance was made on the life of Lord *Newhaven*, from the 1st of *December* 1792, to the 1st of *December* 1793.—In an action on the policy, the only question was, as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell*, in a large sum of money; part of which debt had been assigned by them to another person; the remainder being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon*, who tried the cause, was of opinion, that this debt was a sufficient interest. He said it was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security.—The jury found a verdict for the plaintiff.

Whether this ought not to be confined to the case where, by the death of the debtor, the creditor must lose his debt.

From the above note of this case, though it seems to be a defective one, it may reasonably be supposed that the plaintiff had only Lord *Newhaven*'s personal security for the debt, and that with him died all hopes of repayment from his estate. Upon this ground I think there could be no doubt but that the creditor had an insurable interest in Lord *Newhaven*'s life, to the amount of the debt. But Lord *Kenyon* is stated to have said, that, "*At all events, the death must, in all cases, in some degree, lessen the security.*"—As an abstract proposition, this is, in general, true. But it cannot be inferred from this, that his lordship meant to lay it down as law, that every creditor, however his debt may be secured, has an insurable interest in the life of his debtor, to the amount of the debt. Lord *Mansfield*, in the case of *Stackpool* v. *Simon* (*a*), says that a policy may be considered as a col-

(*a*) Sup. 772.

lateral

lateral ſecurity for the debt due to the inſured.—And yet it would ſeem that, even where the creditor has only the perſonal ſecurity of the debtor to rely upon for repayment, the inſurer, before he pays the ſum inſured, might, perhaps, have a right to call upon the inſured, to ſhew, that nothing could be recovered from the eſtate of the deceaſed debtor. Where the debt is amply and ſatisfactorily ſecured by mortgage or otherwiſe, the creditor can have but the ſhadow of an intereſt in the life of the debtor. But, by the third ſection of the above act, it is declared, that '*No greater ſum ſhall be recovered* '*from the inſurer than the amount or value of the intereſt* '*of the inſured in the life inſured.*'—Now, what can be the *amount or value* of the intereſt of the creditor, in the caſe put?—Surely nothing that a jury could eſtimate.

Since the former impreſſion of this work a caſe has been determined in the court of King's Bench, which ſtrongly exemplifies and confirms this doctrine.

The plaintiffs, who were coachmakers in *Long Acre*, on the 29th of *November* 1803, effected an inſurance with the *Pelican* life inſurance company, on the life of the late Right Honourable *William Pitt* for 500 l. for ſeven years at an annual premium of 15 l. 15 s.—In an action on the policy, the plaintiffs averred that, "*at the time of making* "*the inſurance, and from thence until the death of Mr. Pitt,* "*they were intereſted in his life to the amount of the ſum* "*inſured.*"—Upon the trial it appeared that Mr. *Pitt*, at the time of the execution of the policy, and from thence to the time of his death, was indebted to the plaintiffs in more than 500 l. and died inſolvent; and that, after his death, and before the commencement of the ſuit, the executors of Mr. *Pitt* paid to the plaintiffs, out of the money granted by parliament for the diſcharge of his debts, 1109 l. 11 s. 6 d. in full for the debt due to them from Mr. *Pitt*.—The court determined that the plaintiffs were not entitled to recover.—They held that this inſurance, like every other to which the law gives effect, is, in its nature, a contract of *indemnity*, as diſtinguiſhed from a wager; that the intereſt which the plaintiffs had in the life of Mr. *Pitt* was that of creditors, in a caſe

Godſall & others v. *Boldero* & others, 9 *Eaſt* 72.

If after the death of a debtor whoſe life is inſured by a creditor, and before any action brought on the policy, the debt be paid, no action will lie.

where the probability of payment depended on the continuance of his life, and the indemnity ſought by the inſurance was againſt the loſs that might reſult from his death; that the action was therefore founded on a ſuppoſed damnification of the plaintiffs, occaſioned by his death, *and exiſting at the time of the action brought*; and therefore if, before the action brought, the damages occaſioned by his death were prevented by payment of his debt, the ground of the action was taken away.

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker.

No creditor has an inſurable intereſt in the life of his debtor, unleſs the debt be incurred upon a *good and legal conſideration*; and, therefore, the holder of a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note.

Dwyer v. *Edie*, at N. P. after Hil. 1788. *Park* 432.

As where a policy was effected on the life of *James Ruſſell*, from the firſt of *June* 1784 to the firſt of *June* 1785.—By a memorandum at the foot of the policy it was declared, that it was intended to cover the ſum of 5,000l. due from *Ruſſell* to the plaintiff, for which he had given his note, payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant; 1ſt, That part of the conſideration for the note, was money won at play; 2dly, That *Ruſſell*, at the time he gave the note, was an infant.—Mr. Juſtice *Buller*, who tried the cauſe, nonſuited the plaintiff, upon the ground that part of the conſideration for the note, being for a gaming tranſaction, there was a want of intereſt in the plaintiff. But as to the objection of the infancy of *Ruſſell*, he ſaid the intereſt was contingent; for *Ruſſell* might or might not have avoided the note; and he doubted much whether, till ſo avoided, the note muſt not be taken, as againſt a third perſon, to be the note of a perſon of full age; and the maker of the note only could take the objection.

The infancy of the debtor cannot be objected by an inſurer.

Tidſwell v. *Angerſtein*, Peake 151.

A truſtee may inſure for the benefit of the *ceſtuy que truſt*.

A truſtee may inſure for the benefit of the *ceſtuy que truſt*.—As where an inſurance was made on the life of one *Holden*, from the 17th of *Auguſt* 1790, to the 17th of *Auguſt* 1791, and during the life of the plaintiff. *Holden* had granted an annuity to the plaintiff's late brother,

brother, which annuity he had bequeathed to perſons not parties to this inſurance, having made the plaintiff executor of his will, and directed him to make inſurance. —In an action on this policy, brought by the executor, it was objected that, as the annuity was not deviſed to him by the grantee, he had no inſurable intereſt in the life of *Holden* the grantor.—But Lord *Kenyon* thought this a ſufficient intereſt in the executor to ſupport the action.

CHAP. IV.

Of the Risks in Insurances upon Lives.

A loss upon this contract, must always be total.

AS, by the terms of this contract, the entire sum insured is to be paid upon the happening of one single event, which cannot *partially* happen, and by the happening of which, the insured must suffer all the injury against which he meant to be protected by the insurance, the loss must always be total, and never can be partial.

The usual exceptions.

The different insurance companies annex to the contract certain conditions or exceptions.

The *Royal Exchange Assurance* declares every insurance made by a person *on his own life* to be void, if the person, whose life is insured, shall depart the limits of *Europe*, shall die upon the seas, or enter into any military or naval service whatsoever, without the previous consent of the company; or shall die by suicide, duelling, or the hand of justice.

Where the insurance is made by a person, *on the life of another*, death "*by suicide, duelling, or the hand of justice*" is not excepted.

The *Westminster Society* adopts the same exceptions. The *Equitable Insurance*, and the *Pelican Insurance*, adopt the same exceptions, only omitting the word *duelling*, even where the party insures his own life.

To make the insurer liable, not merely the *cause* of the death, but the death itself must appear to have happened *within the time limited.*

We have already seen that, in the case of marine insurances, not only the *cause* of the loss, but the loss itself, must appear to have happened during the continuance of the risk (*a*). The same principle applies to insurances upon lives. And therefore, if a man's life be insured for a year, and some short time before the expiration of the

(*a*) R. *Lockyer* v. *Offley*, 1 T. R. 252, sup. 263, 533.

term,

term, he receive a mortal wound, of which he dies *after the year*, the insurer would not be liable (*a*).

But where it is uncertain whether the death happened within the time limited, this is a question of fact that must be left to the decision of a jury.

This is always a question of fact.

Thus: An insurance was made on the life of *L. Macleane* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778. In an action on the policy it appeared, that, about the 28th of *November* 1777, he sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*.—The question was, whether *Macleane* died before the 30th of *January* 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost; and that the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.—Lord *Mansfield*, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Macleane* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict.—They found for the plaintiff.

Patterson v. *Black*, at N. P. Hil. Vac. 1780.

A question which has often puzzled lawyers, namely; whether a period of time, to commence *from the day of the date*, was inclusive or exclusive of that day, occurred in an action upon a policy upon the life of Sir *Robert Howard*, for one year, *from the day of the date thereof*, which was the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, at one o'clock in the morning.

Sir *Robert Howard's* case, 2 *Salk.* 625, 1 Ld. Ray. 480.

If a policy be to take effect *from the day of the date*, the day of the date is excluded.

(*a*) Per *Willes*, J. in delivering the opinion of the court in *Lockyer* v. *Offley*, 1 T. R. 254.

morning.—Lord C. J. *Holt* held that, *from the day of the date* excludes the day; but *from the date* includes it; and therefore, the day of the date being excluded in this case, the insurer was held liable (*a*).

Reasons why so few litigated questions have arisen in insurances upon lives.

I have now gone through all that seemed to be material upon the subject of insurances upon lives; from which it appears that many of the principles which govern marine insurances are also applicable to this contract. Considering the great multiplicity of insurances which have of late years been made upon lives, the number of litigated cases that have arisen upon them is extremely small. One principal reason is, that the happening of the event insured against is always a fact of easy proof, which can scarcely ever afford any subject of dispute: Another is the great difficulty of practising any fraud in such insurances: But to no cause is this fortunate circumstance more to be ascribed than to the honour,

---

(*a*) See the case of *Pugh* v. the Duke of *Leeds*, *Cowp.* 714, in which, after great deliberation, it was held that the words *from the date*, and *from the day of the date*, mean the same thing; that they are taken to be either inclusive, or exclusive, according to the context, and subject matter; and that either meaning shall be adopted which shall most effectually support, not defeat, the intention of the parties.—This may be a very good rule, in the cases to which it applies: But it would have been of no use in the decision of the case above cited; because the intention of the parties, in that case, could only be collected from the policy; and whether they meant to include, or exclude, the day of the date, depended on the grammatical construction of the words contained in it. If, therefore, such a case were again to occur, it must be decided whether the day of the date should be excluded or included; and then, perhaps, Lord *Holt*'s opinion might be thought the best authority upon that point.—Such a question, however, is not again likely to arise; because it is now the usual practice to mention the day both of the commencement and end of the policy, and to declare both to be inclusive.

integrity,

integrity, and liberality of the ſeveral companies engaged in this branch of inſurance.

Return of premium.

As to return of premium, no queſtion upon that ſubject has ever yet, as far as I have been able to learn, occurred in any caſe of inſurance upon lives. If ſuch a queſtion ſhould ariſe, it muſt be governed by the ſame principles which prevail upon that ſubject in marine inſurances. Theſe will be found under the proper head in the firſt book (*a*). Indeed Lord *Mansfield*, on two occaſions, exemplified his doctrine, upon the ſubject of return of premium, by ſhewing their application to the caſe of an inſurance upon a life (*b*).

Remedy againſt the eſtate of a bankrupt inſurer.

With reſpect to the claim which the inſured upon a life ſhall have upon the eſtate of an inſurer become bankrupt during the continuance of the life inſured; this has been determined to be the ſame as in the caſe of marine inſurances (*c*).

(*a*) See book 1, ch. 15, § 2.——(*b*) See his judgment in *Bermon* v. *Woodbridge*, ſup. 662, and in *Tyrie* v. *Fletcher*, ſup. 659.

(*c*) See the caſe of *Cox* v. *Liotard*, *Doug.* 166, n. ſup. 732.

END OF THE THIRD BOOK.

BOOK THE FOURTH.

Of Inſurance againſt Fire.

WE are now arrived at the fourth and laſt branch of our ſubject, which may be moſt conveniently treated under the following heads:

I. *Of the Nature of this Contract.*
II. *Of the Intereſt of the Inſured.*
III. *Of the Riſk which the Inſurers engage to run.*
IV. *Of the Aſſignment of the Policy.*
V. *Of the Proof of Loſs.*

CHAP. I.

Of the Nature of this Contract.

Inſurance againſt fire defined.

BY this contract the inſurer, in conſideration of a certain premium received by him, either in a groſs ſum, or by annual payments, undertakes to indemnify the inſured againſt all loſs or damage which he may ſuſtain in his houſes or other buildings, ſtock, goods, and merchandize, by fire, during a limited period of time.

The time of its introduction into *England* unknown.

I have not been able to aſcertain the period of the introduction of inſurance againſt fire into this country. But it has certainly been in uſe here conſiderably more than a century. Of late years, notwithſtanding a very heavy ſtamp duty impoſed upon theſe inſurances, they have been brought into very general, I might almoſt ſay univerſal, uſe, in this country; particularly in *London* and other cities and large towns.

Very little in uſe in other countries.

I do not find, however, that this ſpecies of inſurance is much in uſe in other countries. It was not till the year 1754 that it came into uſe at *Paris*. In that year, one of the companies inſtituted there for marine inſurances, obtained from the government permiſſion to make inſurances againſt fire. But they have never, as *Pothier* informs us, become

become general even at *Paris* (*a*). In *Holland*, though inſurance againſt fire is not altogether unknown, few people ſeek its protection; perhaps becauſe in that country they can rely ſo much on their own caution, that they think it unneceſſary to pay for any greater ſecurity. Indeed I have heard it confidently aſſerted, by perſons well acquainted with the cities both of *London* and *Amſterdam*, that, after making all fair allowances, there is, upon an average, more property deſtroyed by fire in the former in one year, than in the latter in ten.

Whether in a national point of view it be more hurtful than beneficial.

It cannot be denied that this ſpecies of inſurance affords great comfort to individuals, and often preſerves whole families from poverty and ruin. And yet it has been much doubted, by wiſe and intelligent perſons, whether, in a general and national point of view, the benefits reſulting from it are not more than counterbalanced by the miſchiefs it occaſions. Not to mention the careleſſneſs and inattention which ſecurity naturally creates, every perſon who has any concern in any of the fire-offices, or who has attended the courts of *Weſtminſter Hall* for any length of time, muſt own that inſurance has been the original cauſe of many fires in *London*, with all their train of miſchievous conſequences.

The objections to it.

More than counterbalanced by its benefits.

On the other hand, the advocates for this ſpecies of inſuranee, though they admit it to have been ſometimes the cauſe of intentional fires, inſiſt, that, even as a national concern, the benefits vaſtly outweigh the miſchiefs which proceed from it. And when we recollect the precautions uſed by the different inſurance companies, to prevent the ſpreading of fires, by providing a number of fire engines, which are kept in conſtant repair, and fit for immediate uſe, not only in all parts of the metropolis, but in every other conſiderable town in the kingdom;—by keeping in conſtant pay, a number of engineers and fire-men, expert in extinguiſhing fires, and porters for the removal of goods;—by employing a number of theſe in patrolling the ſtreets at all hours of the night, in conſtant readineſs to fly to the ſpot from whence

(*a*) Vid. *Pothier* tit. *Des aſſurances*, n. 3.

any alarm of fire may proceed: When we recollect that the courage, promptitude, and addreſs of theſe people often ſtop the progreſs of the moſt dangerous fires, and thereby reſcue many valuable lives, and immenſe property from deſtruction:—When theſe benefits, I ſay, are fairly conſidered, they ſeem to outweigh all the diſadvantages that can be put in the oppoſite ſcale.

Fire inſurance companies.

A conſiderable number of companies have been eſtabliſhed in *London* and other parts of the kingdom for inſurances againſt fire. Of theſe ſome are called *Contribution Societies*, in which every perſon inſured becomes a member or proprietor, participating in profit and loſs. Such are the *Hand in Hand*, and the *Weſtminſter* fire-offices, for the inſurance of houſes and other buildings; and the *Union* fire-office, for inſurance of goods. The other companies inſure both houſes and goods, at their own riſk. Of theſe the principal are the *London*, and *Royal Exchange*, aſſurance corporations, the *Sun*, the *Phœnix*, the *Britiſh*, and many other offices recently eſtabliſhed for this branch of inſurance.

Policies againſt fire are ſubject to a *ſtamp* of 1s. and to a *yearly* duty of 2s. 6d. *per cent.* on the ſum inſured

As to the *duties*, to which this contract is liable, the ſtat. 44 *G.* III. c. 98, § 1, repeals all the former *ſtamp duties* (*a*) impoſed on policies of inſurance againſt fire; and, (by § 2.) impoſes on every policy, in lieu thereof, a new duty of *one ſhilling*, and alſo the *yearly* ſum of *two ſhillings and ſixpence* (*b*), for every 100l. and ſo in proportion for any greater or leſs ſum inſured, is laid on every policy for inſuring houſes, furniture, goods, wares, and merchandize, or other property, from loſs by fire.—This ſtatute (*c*) enacts that the proviſions of the former acts, except where they are altered by this act, ſhall extend to the duties impoſed by this act.

(*a*) Vid. the ſchedule A. annexed to this act.—(*b*) Vid. ſchedule B.—(*c*) § 8.

CHAP. II.

Of the Intereſt of the Inſured.

Whether an inſurance againſt fire without intereſt be void at common law.

I DO not find that it has ever been a practice to make inſurances againſt fire, avowedly without intereſt. The probable conſequences of ſuch inſurances would, I conceive, afford a powerful argument againſt the legality of any inſurance without intereſt, at common law. If a wager policy be good, at common law, I do not know that it muſt neceſſarily aſſume the form of any particular ſpecies of inſurance: But if the queſtion, whether a wager policy be a legal contract at common law, were to ariſe in the caſe of an inſurance againſt fire, it is impoſſible to ſuppoſe that the judges could ever be prevailed upon to ſanction by their authority a contract of ſo miſchievous a tendency.—Lord Chancellor *King*, in the caſe of *Lynch* v. *Dalzell*, which we ſhall preſently have occaſion to cite at large, (*a*) ſays; "*The party inſuring muſt have a pro-*"*perty at the time of the loſs, or he can ſuſtain no loſs,* "*and conſequently can be entitled to no ſatisfaction.*" And Lord *Hardwicke*, in the caſe of the *Sadlers Company* v. *Badcock* (*b*), lays it down as law, "*that the inſured muſt* "*have an intereſt or property at the time of inſuring, and at* "*the time the loſs happens.*" So that, according to theſe two great authorities, it is clear that an inſurance againſt fire, without intereſt, would have been void at common law. But if any doubt remained upon that queſtion, it has been removed by the ſtat. 14 *G.* III. c. 48. That act, though it is entitled, an act for regulating *inſurances upon lives*, yet, by the enacting clauſe, (ſect 1.) (*c*), it prohibits all inſurances without intereſt, "*upon any event*

Since the ſtat. 14 *G.* III. c. 48. it would be clearly void.

(*a*) Inf. 801.——(*b*) Inf. 804.——(*c*) Sup. 774.

The insured can only recover, in case of loss, to the extent of his interest.

"*or events whatsoever*" The 4th section, indeed, provides that it shall not extend to marine insurances, which shews that it was the intention of the legislature that it should extend, according to the above words in the enacting clause, to every other species of insurance, and therefore there can be no doubt of its extending to insurances against fire; and consequently the insured, whatever may be the amount of his insurance, can only recover to the extent of his interest.

The necessity of preventing insurances against fire, without interest.

There is reason to believe that insurances against fire are often made to a large amount upon property of very small value. This can only be done with a fraudulent view, and a premeditated fire must be the necessary consequence.—Where a loss has happened, and there is no colour to suspect any unfair practice on the part of the insured, I think the offices ought not to content themselves with being merely just: They ought to be generous and liberal towards a fair sufferer. But where there is any reasonable ground to suspect fraud, it is to be hoped that the managers of no office will, from any false notion of generosity, or any wish to acquire popular favour, so far forget what they owe to the public, as well as to their own characters, as to suffer the claim to be satisfied, without the most scrupulous investigation.

If there be several insurances on the same property, each office must have notice of this.

It often happens that no one office will insure to the full amount required by a particular person, who has a large property to insure; and in such case, the party can only cover his whole interest, by several insurances made at different offices. But then it is proper that each office should have notice of every insurance thus made on the same effects; for otherwise great frauds might be practised by insuring the same property to its full value, at several different offices at the same time. To guard against such frauds, there is, in the printed proposals of each of the offices, an article which declares that, persons insuring must give notice of any other insurance made elsewhere upon the same houses or goods, that the same may be allowed by indorsement on the policy, in order that each office may bear its rateable proportion of

any loſs that may happen (*a*). But unleſs ſuch notice be given of each inſurance to the office where another inſurance is made on the ſame effects, the inſurance made without ſuch notice will be void.

It is not neceſſary, however, in order to conſtitute an inſurable intereſt, that the inſured ſhall, in every inſtance, have the abſolute and unqualified property of the effects inſured. A truſtee, a mortgagee, a reverſioner, a factor or agent, with the cuſtody of goods to be ſold upon commiſſion, may inſure; but with this caution, that the nature of the property be diſtinctly ſpecified (*b*); and that all the inſurances upon the ſame property, taken together, ſhall not exceed the full value thereof.

But a perſon may inſure without having the abſolute property.

(*a*) Vid. ſup. 146.——(*b*) See the 6th article of the propoſals of the *Sun* fire-office, and 7th article of the propoſals of the *Phœnix* fire-office.

CHAP. III.

Of the Risk, which Insurers against Fire, engage to run.

The risk usually insured against.

BY the terms of the usual policy the insurers undertake to pay, make good, and satisfy to the insured all loss or damage, which may happen by fire, during the term specified in the policy, to the houses or other buildings, furniture, or merchandize insured.

The proviso, excepting fires occasioned by extraordinary events.

By an article of the printed proposals, which, as we shall presently see (*a*), are now to be considered as making a part of the contract, it is provided that, 'No loss or 'damage by fire, happening by any invasion, foreign 'enemy, or any military or usurped power whatsoever, 'will be made good by this company.'

Drinkwater v. *Lond. Assur.* 2 *Wils.* 363.

The words *usurped power*, in the proviso, mean an invasion from abroad or an internal rebellion; not the power of a common mob.

In the following case, a question arose upon the construction of the words *usurped power*, in this proviso.—It was an action of covenant on a policy of the *London Assurance* company against fire, upon a malting office at *Norwich*. The defendants, amongst other pleas, pleaded that the malting office was burned by *an usurped power*; and issue being joined on this plea, the cause was tried at *Norwich* assizes, and a verdict found for the plaintiff, damages 469l. subject to the opinion of the court upon a case, which stated, 'That on the 27th of *November*, a 'mob arose at *Norwich*, on account of the high price of 'provisions, and spoiled and destroyed a considerable 'quantity of flour; that thereupon the proclamation was 'read, and the mob dispersed for that time. That after-'wards another mob arose and burnt down the malting 'office mentioned in the policy.'——Lord C. J. *Wilmot*, Mr. Justice *Clive*, and Mr. Justice *Bathurst*, against the

(*a*) Vid. *Oldman* v. *Bewicke*, *Routledge* v. *Burrell*, and *Wood* v. *Worsley*, inf. ch. 5.

opinion

opinion of Mr. Juſtice *Gould*, determined that the true import of the words *uſurped power* in the proviſo, was, an invaſion from abroad, or an internal rebellion, where armies are drawn up againſt each other; when the laws are ſilent; and when the firing of towns becomes unavoidable: But that thoſe words could not mean the power of a common mob.

The words *civil commotion*, were held to exclude loſſes in the riots of 1780.

The *London Aſſurance* company ſtill, however, retain the proviſo in its original form. The *Sun* fire-office, in the year 1727, added the words *civil commotion* (*a*); and upon the conſtruction of theſe words another queſtion aroſe in conſequence of the tumults with which the metropolis of the *Britiſh* empire was diſgraced in the ſummer of the year 1780. Theſe tumults were excited by certain perſons who, under the maſk of religion, pretended to ſeek the repeal of a law then lately paſſed, granting to *Roman* catholics, certain indulgences and ſome mitigation of the hardſhips under which they, at that time, laboured in this country; but their object was nothing leſs than the entire ſubverſion of the government. And to accompliſh this purpoſe, they excited to univerſal devaſtation, a deſperate and lawleſs rabble, made up of malefactors and fanatics, who, though actuated by different motives, are at all times equally prone to miſchief and rebellion. Fortunately for this country, the militia was at that time embodied, the rioters were repreſſed, and the conſtitution preſerved.

Langdale v. *Mason* and others, at N. P. M. h. Vac. 1780. MS.

Amongſt others devoted to deſtruction by this deſperate banditti, was Mr. *Langdale*, a catholic, and a conſiderable diſtiller. They fired his premiſes; and all his ſtock

(*a*) Moſt of the other offices have introduced the ſame words; and ſome have the words '*riot, tumult, and civil commotion.*' It is rather remarkable, however, that neither the *Hand in Hand* or the *Union* Fire Office have any proviſo or exception of this nature in their printed propoſals. It were, perhaps, to be wiſhed, that none of the offices would inſure againſt the miſchiefs occaſioned by riot and civil commotion. Men cannot be too deeply intereſted in the preſervation of the public peace, and the ſupport of lawful authority.

of liquors and other effects were there destroyed.—Being insured in the *Sun Fire Office*, he brought his action upon the policy, to recover a satisfaction for the loss he had thus sustained. The office defended this action on the ground that this loss was occasioned by *civil commotion*. —The cause was tried by Lord *Mansfield*, who, in his address to the jury said;—"Most undoubtedly every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that inclination must be governed by the rules of law and justice; and the only question to be determined arises singly upon the construction of two words in the policy. It appears that in the year 1720, the *London Assurance* company put into their policies all the words here used, except *civil commotion*; and any fire happening by a foreign enemy is clearly provided against, whether they burn houses, or set fire to a town. The words *military or usurped power* are ambiguous; but they have already been the subject of a judicial determination (*a*). They must mean rebellion, conducted by authority; as in the year 1745, when the rebels came to *Derby*; and if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a *rebellion*. That is the only distinction in the case:—It must be by rebellion got to such a head, as to be under some authority. In the year 1726, the *Sun Fire Office*, in imitation of the *London Assurance* company, inserted the same exception: This provided against rebellion, determined rebellion, with generals who could give orders: But the *Sun Fire Office* did not think this sufficient; and therefore, in the year 1727, they introduced the words *civil commotion*; words as general and untechnical as can possibly be used. They do not say *civil commotion*, such as amounts to *high treason*. They avoid saying civil commotion amounting to *felony* or to a *misdemeanour*, but they use the term "civil commotion," taking the largest and most general sense of the words that the language will allow: They do not

(*a*) Vid. *Drinkwater* v. *Lond. Assur.* sup. 790.

even

even ſay a *riot*. It may be a queſtion, in point of law, whether an aſſembly or multitude be a riot. But the ſingle queſtion here is, whether this has been a civil commotion. If there be a caſe, to which theſe words can be applicable, it is to a caſe of this ſort. I cannot ſee any of the other words, to which it can be applied. Uſurped power takes in rebellion, acting under uſurped authority. From a foreign enemy the office is ſecured: But what is a civil commotion? It is ſomething elſe. The preſent was an inſurrection of the people reſiſting all law, ſetting the authority of the government at nought; and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent inſurrection? It took place in many parts of the town at the ſame time, and the very ſame night; the mob were in *Broad ſtreet*, *St. Catherine's*, in *Coleman-ſtreet*, at *Blackfriar's Bridge*, and at the plaintiff's. What is their object? *General deſtruction, general confuſion. It certainly was meant to aim at the very vitals of the conſtitution.* It was not a private matter, under a cry of *No popery only*, to deſtroy all papiſts. *Newgate* is burnt down: The *Fleet* priſon, the *King's Bench* priſon, the new *Bridewell*, are burnt down, and all the priſoners ſet at liberty. The *Bank* attacked; the *Exciſe* and *Pay* offices in *Broad-ſtreet* threatened. The houſes of a vaſt number of papiſts burned and deſtroyed. Military reſiſtance neceſſary, and an extraordinary ſtretch was made, which was juſtified by neceſſity. Many men have been killed. What is this but a *civil commotion*, if any preciſe meaning can be affixed to thoſe words. It is ſaid that this is a civil commotion diſtinct from uſurped power and rebellion. It is admitted, that this kind of inſurrection may amount to high treaſon: and, to be ſure, it may. But the office do not mean to try whether theſe rioters were guilty of high treaſon or not. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot: That would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; *an inſurrec-*

tion

tion of the people for general purpoſes, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiffs."—The jury found a verdict for the defendants.

But an inſurance company who pay a loſs, occaſioned by riot, may ſue the *Hundred* upon the riot act, in the name of the inſured.

But Mr. *Langdale* was not without remedy. He afterwards brought his action againſt the *Hundred*, upon the riot act, 1 *G.* I. c. 5, § 6, and recovered a full ſatisfaction for the damage he had ſuſtained.—Had the office not been exempted from this loſs by the words *civil commotion* in their propoſals, they would have had their remedy over againſt the *Hundred*. In the following caſe, which came before the court of King's Bench in the year 1782, it was determined that an inſurance company, having paid a loſs occaſioned by riots, may recover back ſuch loſs, in an action againſt the *Hundred*, on the above act, brought in the name of the inſured.

Maſon v. *Sainſbury*, E. 22 *G.* III. B. R.—MS.

That was an action brought againſt the *Hundred* on the riot act, ſtat. 1 *G.* I. c. 5, § 6, to recover a ſatisfaction for the damage ſuſtained by the plaintiff, by the demolition of his houſe, in the riots of 1780.—Upon the trial of the cauſe, there was a verdict for the plaintiff, with 259l. damages, ſubject to the opinion of the court on a caſe, which ſtated, in ſubſtance, that the plaintiff had inſured his houſe in the *Hand in Hand* fire office; that the fire office had paid the loſs, without any action being brought againſt them; and that this action was brought againſt the *Hundred* in the plaintiff's name, and with his conſent, for the benefit of the inſurance office, and to reimburſe them the loſs they had paid.—The queſtion was, whether, as the plaintiff had already received a ſatisfaction, this action could now be maintained againſt the Hundred on behalf of the inſurers.—It was contended on the part of the Hundred, that it was the policy of the act, beſides the inducement to ſuppreſs riots, to divide the loſs, and prevent the ruin of individuals; but there could be no reaſon of policy or juſtice to extend this,

beyond

beyond the party himſelf, to bodies or individuals, who have wilfully put themſelves into this danger: That though it was true that a man, having different remedies may purſue either, and it is no defence to the one, that he might have purſued the other; yet, when he has recovered by one, he ſhall not afterwards ſeek a ſecond ſatisfaction by the other.—But the court were unanimouſly of opinion that the office had a right in this caſe, to recover againſt the Hundred, in the name of the inſured.—Lord *Mansfield* ſaid;—"Though the office paid without a ſuit, this muſt be conſidered as without prejudice; and it is, to all intents, as if it had never been paid. The queſtion comes to this: Can the owner of the houſe, having inſured it, come againſt the Hundred, under this act? Who is firſt liable? If the Hundred be firſt liable, ſtill it makes no difference: If the inſurers be firſt liable, then payment by them is a ſatisfaction, and the Hundred is not liable. But the contrary is evident, from the nature of the contract of inſurance. It is an *indemnity*. We every day ſee the inſured put in the place of the inſurer. In abandonment it is ſo; and the inſurer uſes the name of the inſured. It is an extremely clear caſe. The act puts the Hundred in the place of the treſpaſſers; and on principles of policy, I am ſatisfied that it is to be conſidered as if the inſurers had not paid a farthing."—Mr. Juſtice *Willes* ſaid;—"I cannot diſtinguiſh this from the caſe of an eſcape. If the ſheriff pays, he has his remedy over againſt the party. Though the Hundred is not anſwerable criminally, yet they are not to be conſidered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Juſtice *Aſhurſt* ſaid;—"At all events the plaintiff is entitled to a verdict to the amount of the premium, having had no compenſation as to that. But, on the larger ground, I am of opinion that the Hundred is liable in this action for all the damage ſuſtained by the plaintiff. It is like the caſe of an abandonment, and the office is not to be in a worſe ſituation for having paid the loſs without a ſuit."—Mr. Juſtice *Buller* ſaid;—"Whether this caſe be conſidered on ſtrict, or on liberal, principles of inſurance law, the plaintiff muſt recover. Strictly,

no

no notice can be taken of any thing out of the record. The contract with the office, ſtrictly taken, is a wager; liberally, it is an indemnity: But, on the words, it is only a wager, of which third perſons ſhall not avail themſelves. It has been rightly admitted that the Hundred is put in the place of the treſpaſſers. How could the treſpaſſers have availed themſelves of this ſatisfaction made by the Office? Could they have pleaded it by way of *accord and ſatisfaction?* It was not paid as a ſatisfaction for the treſpaſs, and the facts of the caſe would not have ſupported ſuch a plea. The beſt way is to conſider this caſe as a contract of indemnity, in which the principle is, that the inſurer and the inſured are as one perſon; and in that light, the paying before or after, can make no difference."

How far the inſured is protected by the policy during the 15 days allowed for paying the renewed premium.

In general, the riſk commences from the ſigning of the policy, unleſs ſome other time be ſpecified; and it will of courſe end with the term for which it is made. Inſurances againſt fire are, in general, either annual, or for a term of ſeven years at an annual premium; and the offices, as an indulgence to the inſured, generally allow 15 days from the expiration of each year for the payment of the premium for the next ſucceeding year. But the inſured has always been conſidered as being under the protection of the policy till the expiration of the 15 days, provided the premium were paid within that time.

How far in the caſe of a half-yearly policy.

In the printed propoſals of the *Sun Fire Office*, and of ſome others, there is this article:—'On beſpeaking 'policies all perſons are to make a depoſit for the po- 'licy, ſtamp duty, and mark; and ſhall pay the pre- 'mium to the next quarter day, and from thence for one 'year more at leaſt; and ſhall, as long as the managers 'agree to accept the ſame, make all future payments 'annually at the ſaid office, within 15 days after the 'day limited by their reſpective policies, upon forfeiture 'of the benefit thereof; and no inſurance is to take place 'till the premium be actually paid by the inſured, his, her, 'or their agent or agents.'—In the following caſe it became a queſtion how far the inſured, upon a half-yearly policy,

was

was protected during the 15 days, before the new premium was actually paid and accepted.

Turleton and others v. *Staniforth* and others. 5 T. R. 695. 1 *Boſ. & Pul.* 483.

The inſured in a policy agrees to pay the premium half-yearly, within 15 days of the expiration of the former half year. A loſs happens within the 15 days, but before the renewed premium is paid.—The inſurers are not liable, though the premium is tendered before the end of the 15 days.

It was an action againſt the *Liverpool* fire office, which had adopted the above article. The plaintiff declared on a policy dated the 10th of *December* 1788, in which, (after reciting that the plaintiffs had paid 7l. 10s. to the office, and had agreed to pay 7l. 10s. on the 10th of *June* 1789, and the like ſum every ſix months during the continuance of the policy), it was declared that, from the date of the policy, ſo long as the plaintiffs ſhould pay the ſum of 7l. 10s. at the times and places aforeſaid, and the truſtees or acting members of the ſociety ſhould agree to accept the ſame, the funds of the ſociety ſhould be liable to pay the plaintiff ſuch damage and loſs as they ſhould ſuffer by fire, not exceeding 6000l. according to the exact tenor of their printed propoſals.—The declaration, after ſetting forth the above article of the printed propoſals, ſtated that the ſociety had, from the year 1777, been in the practice of inſuring for periods leſs than a year, by policies ſimilar to the preſent, referring, in like manner, to the ſame printed propoſals; and that they had received the premiums within the 15 days after the times limited in ſuch policies, and the policies thereupon remained in force. It then ſtated a loſs, to the amount of 6000l. on the 11th of *December* 1789, before the expiration of the 15 days, and before any refuſal to accept the renewed premium, or to continue the policy. There was a ſecond count, ſtating that before the expiration of the 15 days, the plaintiffs tendered at the office 7l. 10s. to the managers of the ſociety, they not having then diſagreed or refuſed to accept the ſame.—The defendants, amongſt other pleas to the firſt count, pleaded that the plaintiffs did not pay the ſum of 7l. 10s. on or before the 10th of *December*, as they ought to have done, in order to have continued the policy to the time when the loſs happened. To the ſecond count they pleaded, that the ſum of 7l. 10s. was not tendered to the managers, until after the 10th of *December*.—Upon a demurrer to theſe pleas, the court determined that, under the above circumſtances, the plaintiffs

tiffs were not entitled to recover, and gave judgment for the defendants.—Lord *Kenyon* ſaid;—"It is admitted that the inſurance did not extend to half a year and 15 days; and that completely puts an end to the whole caſe. The plaintiffs ſtipulated to pay 7l. 10s. half yearly, on the 10th of *June*, and the 10th of *December*; and that they would, *as long as the managers agreed to accept the ſame*, make their payments within 15 days after the day limited; *but no inſurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumſtances which muſt both concur; namely, that the inſured ſhould pay the 7l. 10s. and that the inſurers ſhould agree to accept that ſum. Barely ſtating theſe facts is ſufficient to ſhew that the plaintiffs are not entitled to recover.—This judgment was afterwards affirmed in the *Exchequer Chamber*.

But ſeveral offices hold themſelves liable during the 15 days *on annual policies.*

Soon after the above deciſion, the *Royal Exchange*, the *Phœnix*, and ſome other inſurance companies, gave notice that they did not mean to take advantage of this judgment; but would hold themſelves liable for any loſs during the 15 days that are allowed for the payment of the renewed premium upon annual policies, and others for a longer period: But that every policy for a ſhorter period than a year, would ceaſe at ſix o'clock in the evening of the day mentioned therein.

If the inſurance company, having an option to determine the inſurance at the end of the year, give the inſured notice of their intention to do ſo, they are not liable for a loſs happening within the 15 days after the end of the year.

If it be agreed by the policy that the inſurance ſhall continue as long as the inſured ſhall continue to pay the ſtipulated premium, *and the company ſhall agree to accept it*; and, by the printed propoſals, the company agree that perſons inſured for a year or more ſhould be conſidered as inſured for 15 days *beyond the expiration of their policies*; and the company, before the expiration of the year, give the inſured notice to pay an increaſed premium, otherwiſe they would not continue the inſurance, and the inſured refuſe this; the company is not liable for any loſs upon this policy happening within the 15 days after the expiration of the year, though the inſured, after the loſs happened, and before the expiration of the 15 days, tender the full premium which had been demanded.

For

For the effect of the whole contract being only to give the inſured an option to continue the inſurance, or not, during the 15 days after the expiration of the year, by paying the premium for the year enſuing, notwithſtanding any intervening loſs, provided the company have not, before the end of the year, determined the option by giving notice that they would not renew the contract (*a*).

(*a*) R. *Salwin* and others v. *James* and another, 6 Eaſt 571.

CHAP. IV.

Of the Assignment of the Policy.

An assignment of the policy to one who has no interest in the effects insured, is void.

A POLICY of insurance, being a *chose in action*, is, in strictness, not assignable at law. But, like every other chose in action, it may be assigned in equity; and courts of law now take notice of such assignment; so that the ancient rule of the common law, being often found injurious to the interests of a commercial country, is now, in a manner, disregarded, or at least evaded. But the mere assignment of the policy, would be of little avail, without an assignment of the subject matter of the insurance also. The assignee could derive no benefit from the policy, unless the interest of the insured were transferred with it; because, as we have already shewn, the insured must not only have an interest in the subject matter of the insurance, at the time of insuring, but also at the time the loss happens (*a*).

Upon the death of the insured, the policy is continued to his representative.

In the printed proposals of all the offices it is declared that, upon the death of an insured, his interest in the policy shall be continued to his representative to whom the property belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the office.

The contribution societies seem to allow the assignment of their policies without any express permission.

In the proposals of the *Hand in Hand* fire office, it is declared, that if the premises insured should be assigned, the assignment must be entered at the office; and that assignments of policies shall be entered at the office, within 42 days after they are executed; or else the assignee shall have no benefit thereby. And in the proposals of the

(*a*) Per Lord *King*, Ch. in *Lynch* v. *Dalzell*, inf. 801; Per Lord *Hardwicke* Ch. in the *Sadlers Company* v. *Badcock*, inf. 804; vid. sup. 787.

Union

Union fire office, it is declared that every member transferring his policy, ſhall, within three months, give notice to the directors, and bring his policy to the office, to have ſuch transfer indorſed.

The *Weſtminſter* office merely requires that the aſſignment ſhall be entered at the office as ſoon as poſſible. So that, it would ſeem, the policies of theſe three *contribution ſocieties* may be aſſigned, without any expreſs permiſſion from the reſpective offices for that purpoſe; and that it is ſufficient if the aſſignment be brought there to be entered.

But the other offices allow of no aſſignment without their expreſs permiſſion.

But the other offices give notice, generally upon the policy, that it ſhall be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry in the books of the office, or indorſed on the policy. So that it ſeems to be a ſettled rule in all thoſe offices, not to allow any transfer of any policy, without the conſent of the managers. This is perfectly reaſonable. The offices may chuſe for whom they will inſure; they are not obliged to inſure for every perſon that may apply to them. In ſome inſtances, character may be a ſufficient reaſon for a refuſal. But the offices would be deprived of this option, if any perſon inſured might aſſign his policy to whom he pleaſed, without their concurrence. This will appear from the following caſe.

Lynch and another v. *Dalzell* and others, 3 *Bro.* Parl. Ca. 497.

On the 28th of *July* 1721, one *Richard Ireland* obtained a policy from the *Sun* fire-office for the inſurance of his houſe, being the *Angel* inn at *Graveſend*, with his goods therein, from loſs and damage by fire: And it was agreed, that ſo long as *Ireland* ſhould pay five ſhillings a quarter, the ſociety would ſatisfy the ſaid *Ireland*, his executors, adminiſtrators, and aſſigns, his loſs not exceeding 1000l. according to the exact tenor of their printed propoſals.—Some conſiderable time afterwards, *Ireland* died, leaving his ſon *Anthony* his ſole executor, who brought the policy to the office, and had an indorſement made thereon, that the ſame belonged to him; and he afterwards paid one year's premium up to *Chriſtmas* 1727. In *Auguſt* 1727, the houſe was deſtroyed by fire; and ſome time afterwards, the plaintiffs

The inſured upon a houſe and goods aſſigns the houſe to *A.* and the goods to *B.*; *B.* aſſigns the goods over to *A.* to ſecure to *A.* the money advanced for *B.* to purchaſe them. Afterwards a fire happens, and the inſured aſſigns the policy to *A*; and *B.* alſo aſſigns to him his intereſt in the policy. Theſe aſſignments of the po-

licy being made after the fire happened, and without the conſent of the office, the aſſignee cannot recover the loſs under it.

tiffs applied to the office, and alleged that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire; and that they had an aſſignment of the policy made to them, at the ſame time that the houſe and goods were aſſigned; and they produced an affidavit from *Roger Lynch*, in which he ſwore that their loſs, by the burning of the houſe, amounted to 500l. and upwards; and upon this affidavit was indorſed the uſual certificate from the miniſter and churchwardens, &c.: But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the plaintiffs by the burning of any goods; nor was any affidavit made by *Anthony Ireland*, that he had ſuffered any loſs.—The plaintiffs, however, inſiſted that the office ſhould pay them 100l. for their loſs by the burning of the houſe and goods; and they filed a bill in chancery, ſetting forth, that *Anthony Ireland*, on the 24th of *June* 1727, for 25l., aſſigned to them a leaſe of the houſe and ſtables; but that the goods for which the plaintiffs, as they alleged, were to pay 500l., being intended for one *Thomas Church*, who was to hold the inn under them, *Ireland*, by bill of ſale of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated the aſſignment of the policy to the plaintiffs; and that, although the bill of ſale of the goods was made to *Church*; yet that the plaintiffs paid the purchaſe money, and *Church* aſſigned the bill of ſale to them for ſecuring it; and alſo releaſed to the plaintiffs his intereſt in the policy.—The defendants, by their anſwer, alleged that the affidavit produced was not agreeable to the propoſals; that no aſſignment of the policy was made to the plaintiffs, nor any aſſignment of it made to them by *Church*, till after the fire. They inſiſted that the policies iſſued by the office were not in their nature aſſignable, being only contracts to make good the loſs which the contracting party *himſelf* ſhould ſuſtain; and that no other perſon was entitled to any benefit from it. The cauſe proceeded to iſſue; and witneſſes being examined on both ſides, it appeared upon the plaintiff's own evidence, that the agreement for the aſſignment of the policy, (if any), was not till after the agreement for the

the purchaſe of *Ireland*'s term in the houſe; and that the aſſignment of it, though bearing date *before*, was not made till ſome time *after* the fire: So that the agreement for aſſigning the policy was a voluntary conceſſion on the part of *Ireland*, and independent of the bargain for the houſe, and not made till after *Ireland*'s intereſt in the houſe was determined; nor carried into execution till after the loſs had happened. And as to the plaintiff's property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300l.; but omitted to ſtate *when* this aſſignment was made, though the defendants, by their anſwer, had put the time in iſſue.—Upon this caſe, the Lord Chancellor *King* diſmiſſed the plaintiff's bill.—He ſaid;—"Theſe policies are not inſurances of the ſpecific things mentioned to be inſured, nor do ſuch inſurances attach on the realty, or in any manner go with the ſame, as incident thereto, by any conveyance or aſſignment: But they are only ſpecial agreements with the perſons inſured, againſt ſuch loſs or damage as they may ſuſtain. *The party inſured muſt have a property at the time of the loſs, or he can ſuſtain no loſs: and conſequently can be entitled to no ſatisfaction.* There was no contract ever made between the office and the plaintiffs for any inſurance on the premiſes in queſtion. Not only the expreſs words, but the end and deſign of the contract with *Ireland*, do, in caſe of any loſs, limit and reſtrain the ſatisfaction to ſuch loſs as ſhould be ſuſtained by *Richard Ireland* only; and the indorſement on the policy transferred that right to his executor *Anthony Ireland* only. Theſe policies are not in their nature aſſignable; nor is the intereſt in them ever intended to be transferable from one to another, without the expreſs conſent of the office. The tranſactions in the preſent caſe, by changing the property backwards and forwards, and rendering it uncertain whoſe the true property really was, raiſe a ſuſpicion, and fully juſtify the caution of the office in preventing the aſſignment, without the conſent of the managers; which method is purſued by all the inſurance offices. Beſides, the plaintiff's

The policy does not paſs with the effects inſured.

The policy is only aſſignable with the conſent of the office.

claim is, at beſt, founded only on an aſſignment never agreed for, till the perſon inſured had determined his intereſt in the policy, by parting with his whole property, and never executed till the loſs had actually happened."—Upon appeal to the Houſe of Lords, the decrée of the Court of Chancery was affirmed.

The Sadler's Company v. *Badcock* and others, 2 *Atk.* 554.

A leſſee having an unexpired term of ſix years and an half in a houſe, inſures for ſeven years. After the term expired the houſe is burnt, and afterwards, but before the expiration of the policy, the inſured aſſigns it to the reverſioner, without the concurrence of the office. — The aſſignee cannot claim any benefit under the policy,

The ſame principles were adopted in another caſe, where one *Anne Strode*, having ſix years and a half to come in a leaſe of a houſe from the plaintiffs, on the 27th of *April* 1734, inſured the houſe for 400l. in the *Hand in Hand* fire office, for ſeven years, and thereby became a proprietor; and, on paying twelve ſhillings down, and 3l. ſome time after, the company agreed, out of their contribution ſtock, 'to *pay the ſaid ſum of* 400l. 'to *her, her executors and aſſignees, ſo often as the houſe* 'ſhould *be burnt down during the ſaid term, unleſs the di-* 'rectors *ſhould rebuild the ſame*;' and on the back of the policy it was indorſed, 'that *if the policy ſhould be aſſigned,* 'the *aſſignment muſt be entered within* 21 *days after the* 'making *thereof.*'—Mrs. *Strode*'s leaſe expired at *Midſummer* 1740; the houſe was burnt down in *January* 1741; and ſhe aſſigned the policy to the plaintiffs on the 23d of *February* 1741. The plaintiffs tendered the aſſignment to the defendants to be entered in their books, but they refuſed to accept it. The company, in 1738, which was ſubſequent to Mrs. *Strode*'s policy, made an order, 'That 'whereas policies expire upon the property of the in- 'ſured's ceaſing; if there is no application of the in- 'ſured to aſſign, or to have the loſs made up, then 'the perſon having the property, may inſure the ſaid 'houſe in the ſaid office, notwithſtanding the term 'for which the ſaid houſe was originally inſured is 'not expired.' The queſtion upon this caſe was, whether the plaintiffs, the aſſignees of Mrs. *Strode*, were entitled to the benefit of the policy.—The court determined that they were not entitled to any benefit under it. — The Lord Chancellor *Hardwicke* ſaid; — "During the progreſs of this cauſe, while the defendants ſeemed to depend chiefly upon the ſubſequent order,

I was

I was of opinion againſt them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three queſtions made in this cauſe. *Firſt*, Whether this accident, which has happened, be ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs. *Secondly*, whether upon the terms of the original policy, the office be obliged to do it. *Thirdly*, which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode* under this policy. If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee; her time expired at *Midſummer* 1740; the houſe was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the *Sadler's Company*, were ground landlords, and entitled to the reverſion of the term: Upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, that it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there, *intereſt or no intereſt* is almoſt conſtantly inſerted; and if not inſerted, you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety are to make ſatisfaction in caſe of any loſs by fire. To

whom, or for what loſs, are they to make ſatisfaction? Why to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring *the thing*, for there is no poſſibility of doing it, and therefore, muſt mean inſuring *the perſon* from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly that they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order made by the defendants in 1738, has made any alteration. I am of opinion that it has not; for it was made only to explain a particular caſe in the policy, for it might have been a queſtion, whether Mrs. *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on the one hand, it might be hard to ſay, that, as a ſociety, they cannot make any order for the good of the ſociety: On the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened. Now with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400l. would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that houſe are, on the conſtruction of policies, to avoid frauds."

The foregoing determinations shew that, upon an assignment or other transfer of the property insured, the assignee should be very careful to get the policy regularly transferred to him, by the proper indorsement at the office. And in a former part of this work, (*a*) it was shewn that if the assignor undertake to get this done, he will be liable to the assignee for all the consequences of neglecting or omitting to do so; even though his undertaking were merely gratuitous.

If an assignor of the property insured undertake to get the policy transferred to the assignee, he will be liable to an action for neglecting to do so.

(*a*) Vid. *Wilkinson* v. *Coverdale*, sup. 289.

CHAP V.

Of the Proof of Loſs.

The account of the loſs, the affidavits of the inſured, and the certificate from the miniſter, &c. required by the printed propoſals.

THE form of the policy is nearly the ſame in all the offices (*a*). The principal difference between them conſiſts in the terms of certain *propoſals*, as they are called, to which it refers, as making a part of the contract. One principal article, which is found in the propoſals of ſeveral of the offices imports,—'That perſons in-'ſured ſuſtaining any loſs or damage by fire are forth-'with to give notice thereof at the office, and, as ſoon as 'poſſible afterwards, deliver in as particular an account 'of their loſs and damage, as the nature of the caſe will 'admit of; and make proof of the ſame by their oath or 'affirmation, according to the form practiſed in the ſaid 'office; and by their books of accounts, or other proper 'vouchers, as ſhall be reaſonably required; and procure 'a certificate under the hands of the miniſter and church-'wardens, together with ſome other reputable inhabitants 'of the pariſh, not concerned in ſuch loſs, importing,— 'That they are well acquainted with the character and 'circumſtances of the perſon or perſons inſured, and do 'know or verily believe, that, he, ſhe, or they, really 'and by misfortune, without any fraud or evil practice, 'have ſuſtained by ſuch fire, the loſs and damage, as 'his, her, or their loſs, to the value therein-mentioned: 'But, till ſuch affidavit and certificate of ſuch inſured's 'loſs ſhall be made and produced, the loſs money ſhall 'not be payable. And, if there appear any fraud or 'falſe ſwearing, ſuch ſufferers ſhall be excluded all be-

(*a*) Vid. Appendix No. VII.

'neſit by their policies.' In the policies of theſe offices the inſurers undertake to pay the loſs, not exceeding the ſum inſured, '*according to the exact tenor of their printed* '*propoſals*,' deſcribing their propoſals by their reſpective dates.

The reaſonableneſs of requiring this proof.

The above article, though not worded in the beſt poſſible manner, has undoubtedly a very beneficial tendency. Nothing can be more reaſonable in a caſe where there is ſo great a temptation to fraud, than to require a teſtimonial from perſons in public ſituations in the pariſh where a fire has happened, who have opportunities of informing themſelves as to the characters of the inſured, and the fairneſs of their claims; and who are not likely to connive at any fraud. "It is a duty," ſays Mr. Juſtice *Lawrence* (*a*), "that the office owes to the public as well as to themſelves, to take every precaution to protect themſelves againſt fraud. And unleſs ſome ſuch check as the preſent were interpoſed, the office would be holding out a premium to wicked men to ſet fire to their own houſes."—Perhaps it may, ſome time or other, be thought adviſable for all the inſurance companies to agree among themſelves to have this article reviſed, and put into a more unexceptionable form, and to adopt it univerſally. The conſtruction of this article has given occaſion to ſeveral judicial deciſions.

Oldman and others, aſſignees of *Ingram*, v. *Beacon* and others, 2 H. *Bl.* 577. n.

The firſt was an action againſt the directors of the *Sun Fire Office*, upon one of their policies. The plaintiffs, in their declaration, after ſtating that the bankrupt, the inſured, had conformed to the above article, as to the notice, account, and affidavit of the loſs; ſtated that the miniſter of the pariſh of *Portſea*, in which the loſs had happened, reſided at a diſtance from the pariſh, and was wholly unacquainted with the character and circumſtances of the inſured, and unable to make the certificate required by the policy; but that the inſured had procured and delivered to the office a certificate under the hands of ſeveral reputable inhabitants of

To excuſe the want of the certificate, it is not enough to allege that the miniſter reſides out of the pariſh, and does not know the inſured. And the want of this certificate is a defect of title, for which the court will arreſt the judgment, after the plaintiff has obtained a

(*a*) 6 T.R. 722.

the

verdict on the queſtion of fraud, and want of intereſt,

the tenor required by the article. The defendants pleaded 1ſt, That the premiſes were wilfully ſet on fire, and burnt down by the inſured. 2dly, That at the time of the ſuppoſed loſs the inſured had no intereſt in the premiſes. No notice was taken in any of the pleas, of the want of the certificate.—Iſſues being joined on the above pleas, the cauſe went to trial, and the jury found a verdict for the plaintiffs, damages 300l.—The demand was 150l. the ſum inſured.—The defendants moved in arreſt of judgment, on the ground that the plaintiffs had not ſet forth in their declaration a ſufficient title to recover upon the policy againſt the defendants.—In anſwer to this application it was ſaid that it was grounded either on the title being defective, or defectively ſet forth: That the latter objection was cured by the verdict, and the former waived by the defence ſet up in the pleas.—The court, however, arreſted the judgment.—Lord *Loughborough* ſaid,—"Though I am ſatisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, becauſe the inſured had not ſuſtained all the loſs he claimed; yet the rule of intendment after verdict cannot be applied where there is an abſolute defect of title, as there is in this caſe.—As to the pleas, they are wholly collateral to the title."—Mr. Juſtice *Gould* ſaid,—"Till the affidavit is made, and the certificate procured, the money is not payable: The time of payment, therefore, is not yet come.—Though a perſon were a *bonâ fide* ſufferer, ſtill he is not entitled without a certificate. The ſtipulation is a condition precedent, that there ſhall be a certificate to ſhew that there is no kind of fraud. Nothing is ſaid about the churchwardens; and the excuſe of the miniſter living at a diſtance is frivolous."

Routledge v. *Burrell*, and anr. 1 H. *Bl.* 254.

The next caſe upon this ſubject was an action of covenant brought by the executrix of the inſured on a policy of the *Sun Fire Office*.—The declaration, by way of excuſe for not producing the certificate required by the above article, ſtated that the teſtator, the inſured, after the loſs, being entitled to ſuch certificate, applied to the miniſter and churchwardens, and to many reputable inhabitants to procure ſuch certificate; but that the defendants,

The article of the printed propoſals requiring the certificate, though without ſtamp, ſeal, or ſignature, and though only re-

fendants, by falſe inſinuations, and promiſes of indemnity, prevailed on the miniſter, &c. to refuſe to ſign it. —The defendants, as to the firſt breach of covenant, pleaded, 1ſt, That the inſured had no intereſt in the goods, &c. inſured; and 2dly, That they did not prevail on the miniſter, &c. to refuſe to ſign the certificate. —And as to the ſecond breach, they pleaded, 1ſt, No intereſt; and 2dly, That neither the teſtator in his life time, nor the plaintiff ſince his death, had procured ſuch certificate.—Iſſue was joined upon the three firſt pleas, and the plaintiff demurred to the laſt.—In arguing that demurrer, it was contended on the part of the plaintiff, 1ſt, That a condition or reſtriction could not be annexed to, and made part of a deed, by words of mere reference to a printed paper, diſtinguiſhed only by the date of the year in which it was printed, without any ſignature, ſeal, or ſtamp, to give it authenticity; and 2dly, That the reſtriction in queſtion, though it were properly annexed to the deed, was bad in itſelf. Many authorities were cited in ſupport of theſe propoſitions: But the court ſaid that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

ferred to in the policy, is part of the contract, and is binding on the inſured.

At length, in the following caſe, it has been fully ſettled, after ſolemn argument, and upon full deliberation, that the printed propoſals are to be taken as part of the policy; that the procuring of the certificate from the miniſter and churchwardens, &c. is a condition precedent to the payment of the loſs; and that the inſured has no title to demand any loſs, without this certificate, though he ſhould be able to ſhew that the miniſter and churchwardens had wrongully refuſed to ſign one.

It is now ſettled that the procuring the certificate is a condition precedent to the payment of any loſs; and that its being wrongfully refuſed will not excuſe the want of it.

That was an action brought by the aſſignees of the inſured, who had become bankrupts, againſt the *Phœnix* inſurance company. The plaintiffs in their declaration, after ſtating the loſs, and notice to the office, alleged that the bankrupts, ſoon after the loſs, procured and delivered to the company a certificate under the hands of divers reputable houſeholders in the pariſh, in the uſual form; and that, '*as ſoon as poſſible after the loſs, they applied to, and requeſted, the miniſter and churchwar-*

Wood and others aſſignees of *Lockyer* and *Bream* v *Worſley*, 2 H. Bl. 574. 6 T. R. 710.

'*dens*

'*dens of the pariſh to ſign ſuch certificate; but that the ſaid* '*miniſter and churchwardens, without any reaſonable or pro-* '*bable cauſe whatſoever, did wrongfully and unjuſtly refuſe to* '*ſign any ſuch certificate as aforeſaid.*'—There was another ſimilar count, only omitting the requeſt to the miniſter and churchwardens to ſign the certificate, and their refuſal.—To the firſt count, the defendant pleaded; 1ſt, Want of intereſt in the bankrupts; 2dly, That the loſs happened by fraud; and 3dly, That the miniſter and churchwardens did not wrongfully, and without probable cauſe, refuſe to ſign the certificate.—To the ſecond count, the defendant pleaded ſimilar pleas, as to want of intereſt and fraud; and 3dly, That neither the bankrupts nor the plaintiffs had procured any certificate from the miniſter, churchwardens, and reputable inhabitants, as is required by the ſaid printed propoſals.—By the replication iſſue was joined on the firſt five pleas; and as to the laſt plea, the plaintiffs aſſigned the ſame excuſe for the want of the certificate from the miniſter, &c. as in the firſt count of the declaration; and this having proceeded to iſſue, the cauſe was tried and the plaintiffs obtained a verdict for 3,000l.—The defendant moved in arreſt of judgment on the ſame ground, as in the caſe of *Oldman* v. *Bewicke* (*a*), namely, that the production of the certificate was a condition precedent to the payment of the loſs, and that the plaintiffs not having averred performance, had ſhewn no title to recover.—After the argument, Lord C. J. *Eyre*, Mr. Juſtice *Buller*, and Mr. Juſtice *Rooke*, ſeemed to be of opinion that, ſuppoſing the printed propoſals to be conditions precedent, there had been a performance *cy pres*; but that, in truth, the policy being a commercial contract, was to be conſtrued liberally, and the true queſtion was, whether the loſs had been fairly incurred. If it had, and it appeared on the record to have ſo happened, the refuſal of the miniſter and churchwardens was without cauſe, and therefore the plaintiffs were entitled to maintain their action. But Mr. Juſtice *Heath* appeared to differ from

(*a*) Sup. 809.

the

the reſt of the court, and time was taken to deliberate. Afterwards, judgment was given for the plaintiffs, *pro formâ*, as it was underſtood that a writ of error would be brought, whichever way the judgment ſhould be given. —Upon this writ of error, the court of King's Bench, after two arguments, reverſed the judgment of the court of Common Pleas, being unanimouſly of opinion that the production of the certificate was a condition precedent.— Lord *Kenyon* ſaid he did not ſee how the term *cy pres* was applicable to this ſubject; that the argument founded on this, went to ſhew that if none of the inhabitants of this pariſh would certify, a certificate from the inhabitants of the next, or of any other pariſh, would have anſwered the purpoſe. But he ſaid that the inſured could not ſubſtitute other terms or conditions in lieu of thoſe which all the parties to the contract had originally made.

END OF THE FOURTH BOOK.

APPENDIX.

No. I.

Form of a valued Policy of Inſurance upon Ship and Goods, by Private Underwriters.

£.10,000 ——S.G. Delivered the Day of } IN the name of God, *Amen.* as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and ca le and them, and every of them, to be inſured, loſt or not loſt, at and from upon any kind of goods and merchandizes, and alſo upon the body, tackle, apparel, ordnance, munition, artillery boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter, under God, for this preſent voyage or whoſoever elſe ſhall go for maſter in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip, or the maſter thereof, is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from the loading thereof aboard the ſaid ſhip upon the ſaid ſhip, *&c.* and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip, *&c.*: And further, until the ſaid ſhip, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatſoever, ſhall be arrived at upon the ſaid ſhip, *&c.* until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes until the ſame be there diſcharged and ſafely landed; And it ſhall be lawful for the ſaid ſhip, *&c.* in this voyage, t proceed, and ſail to and touch and ſtay at any ports or places whatſoever without prejudice to this inſurance; the ſaid ſhip, *&c.* goods and merchandizes, *&c.* for ſo much as concerns the aſſureds by agreement between the aſſureds and aſſurers, in this policy are and ſhall be valued at

Touching the adventures and perils which we the aſſurers are contented to bear and do take upon us in this voyage, they are, of

of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, taking at ſea, arreſts, reſtraints, and detainments of all kings, princes and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and Ship, *&c.* or any part thereof; and in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof, without prejudice to this inſurance, to the charges whereof we the aſſurers will contribute each one according to the rate and quantity of his ſum herein aſſured: And it is agreed by us the inſurers that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo we the aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own part, our heirs, executors, and goods, to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured
at and after the rate of
In witneſs whereof we the aſſurers have ſubſcribed our names and ſums aſſured in *London*.

N. B. Corn, fiſh, ſalt, fruit, flour, and ſeed, are warranted free from average, unleſs general, or the ſhip be ſtranded; —Sugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average under five pounds *per cent.*; and all other goods, alſo the ſhip and freight, are warranted free of average under three pounds *per cent.* unleſs general, or the ſhip be ſtranded.

No. II.

Form of a Policy of Inſurance on Ship and Goods, by the Royal Exchange Aſſurance Company.

S. G. } S. G. No.
N. } L.

By the Corporation of the *Royal Exchange* Aſſurance.

IN the Name of God, *Amen*.

as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſeth and them, and every of them to be aſſured, loſt or not loſt, upon any kind of goods and merchandizes whatſoever, loaden or to be loaden, and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* burthen, or thereabouts, whereof is maſter (under God) for this preſent voyage or whoſoever elſe ſhall go for maſter in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip or the maſter thereof is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from and immediately following the loading thereof on board the ſaid ſhip and upon the ſaid ſhip, *&c.* and ſo ſhall continue and endure during her abode there upon the ſaid ſhip, *&c.* and further until the ſaid ſhip, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatſoever, ſhall be arrived at upon the ſaid ſhip, *&c.* until ſhe hath there moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes, until the ſame be there diſcharged and ſafely landed: And it ſhall be lawful for the ſaid ſhip, *&c.* in this voyage, to proceed and ſail to, and touch and ſtay at, any ports or places whatſoever, without prejudice to this Aſſurance, the ſaid ſhip, *&c.* goods and

merchandizes, *&c.* for ſo much as concerns the aſſureds, (by agreement made between the aſſureds and the ſaid corporation in this policy) are and ſhall be rated and valued at

Sterling, without farther account to be given by the aſſureds for the ſame. Touching the adventures and perils which the ſaid corporation are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof: And in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* (or any part thereof), without prejudice to this aſſurance, to the charges whereof the ſaid corporation will contribute according to the rate and quantity of the ſum herein aſſured; And it is agreed by the ſaid corporation that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo the ſaid corporation are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this aſſurance by at and after the rate of

per cent. In witneſs whereof the ſaid Corporation have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in the *Royal Exchange* of *London* this Day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

The ſaid corporation are content with this aſſurance for

Free

Free from all average on corn, flour, fiſh, ſalt, fruit, ſeed, hides, and tobacco, unleſs general, or otherwiſe ſpecially agreed.

Free from average on ſugar, rum, ſkins, hemp, and flax, under five *per cent.*; and on all other goods, and on ſhip, under three *per cent*, except general.

By order of the Court of Directors.

No. III.

Form of a Policy of Inſurance on Ship and Goods by the London Aſſurance Company.

SHIP AND GOODS.

London Aſſurance Houſe.

No. No. in *London*.

By the Governor and Company of the *London* Aſſurance.

IN the name of God, *Amen*.

as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſeth and them, and every of them, to be aſſured, loſt or not loſt, at and from upon any kind of goods and merchandizes whatſoever; and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter (under God) for this preſent voyage or whoever elſe ſhall go for maſter in the ſaid ſhip or veſſel, or by whatſoever other name or names the ſaid ſhip or veſſel, or the maſter thereof, is or ſhall be named or called; Beginning the adventure upon the ſaid goods and merchandizes from and immediately following the loading thereof aboard the ſaid ſhip or veſſel at and upon

the ſaid ſhip or veſſel, &c. and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip or veſſel, &c.; and farther, until the ſaid ſhip or veſſel, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatſoever, ſhall be arrived at and upon the ſaid ſhip or veſſel, &c. until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes, until the ſame be there ſafely diſcharged and landed: And it ſhall be lawful for the ſaid ſhip or veſſel, &c. in this voyage, to proceed and ſail to, and touch and ſtay at, any ports or places whatſoever without prejudice to this aſſurance, the ſaid ſhip or veſſel, &c. goods and merchandizes, &c. for ſo much as concerns the aſſureds, (by agreement between the aſſureds and the *London* aſſurance), are and ſhall be rated and valued at without farther or other account to be given by the aſſureds for the ſame. Touching the adventures and perils, which the ſaid *London* aſſurance are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and ſhip or veſſel, &c. or any part thereof: And in caſe of any loſs or misfortune, it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods, merchandizes, and ſhip or veſſel, &c. or any part thereof, without prejudice to this aſſurance, to the charges whereof the ſaid *London* aſſurance will contribute according to the rate and quantity of the ſum herein aſſured: And it is agreed that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange* or elſewhere in *London*: And ſo the ſaid *London* aſſurance are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this aſſurance by the aſſured, at and after the rate of *per cent.* In witneſs whereof the

ſaid

ſaid *London* aſſurance have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in *London*, this day of in the . year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

Free from all average on corn, flour, fruit, fiſh, ſalt, and ſeeds, except general.

Free from average on ſugar, rum, hides, ſkins, hemp, flax, and tobacco, under five pounds *per cent.*; and on all other goods, and ſhip, under three pounds *per cent.* except general.

The ſaid governor and company are content with this aſſurance for

No. IV.

Form of a Bill of Bottomry, by deed poll, where the Ship is to go to ſeveral Ports.

TO ALL PEOPLE, *&c.* I *A. B.* of, &c. mariner, maſter, and part owner of the good ſhip or veſſel called, *&c.* of *London*, of the burthen of two hundred tons, or thereabouts, now riding at anchor in the river *Thames*, within the port of *London*, do ſend greeting; WHEREAS the ſaid ſhip is now bound out upon a voyage from the ſaid port unto the iſland of *Barbadoes*, and from thence, if occaſion ſhall be, to the iſland of *May*, and ſo to return back again to the ſaid iſland of *Barbadoes*, and thence to *London*, to end her voyage; NOW KNOW YE, that I the ſaid *A. B.* for myſelf, my executors and adminiſtrators, do covenant and grant, to and with *C. D.* of *&c.* (who, before the ſealing and delivery hereof, hath paid and advanced unto me the ſaid *A. B.* the ſum of 500l. of lawful money of *Great Britain*, and is contented and hath agreed to ſtand to, and bear the adventure of the ſaid ſum upon the body of the ſaid ſhip, during the ſaid voyage), and to and with the executors, adminiſtrators, and aſſigns of the ſaid *C. D.* by theſe preſents; That the ſaid ſhip, with the firſt good wind and weather after the ..... day of ..... next enſuing the date hereof, ſhall depart from the ſaid river *Thames*, on the ſaid intended voyage, and ſhall by God's grace, (the perils and dangers of the ſea, and reſtraint of princes and rulers excepted), return into the ſaid river *Thames* from her ſaid voyage before the expiration of fourteen months, to be accounted from the date of theſe preſents; and that the ſaid ſhip, in her ſaid intended voyage, ſhall not ſail or apply unto any other ports or places than thoſe before mentioned herein, unleſs ſhe ſhall be neceſſitated thereto, by extremity of weather, or other unavoidable accident. And that I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at, *&c.* the ſum of 560l. of lawful money of *Great Britain*, in reſpect of the adventure aforeſaid, if the ſaid ſhip ſhall go only to the iſland of *Barbadoes*, and from thence return to *London* to finiſh her ſaid intended voyage; and the ſum of 600l. of like money,

if

if the ſaid ſhip ſhall go from thence to the iſland of *May*, and ſo return again to the ſaid iſland of *Barbadoes*, and thence to *London* to end her ſaid voyage; and that within one month after the return of the hull or body of the ſaid ſhip unto the river *Thames*, from her ſaid voyage. PROVIDED ALWAYS, and it is nevertherleſs the true intent and meaning of theſe preſents, That if the ſaid ſhip, in her intended voyage, ſhall happen to be loſt, miſcarry, or be taken by men of war, or pirates, that then this preſent writing or deed, and every covenant, payment, matter, and thing therein contained, on the part and behalf of me the ſaid *A. B.* to be done, paid, and performed, ſhall be void and of none effect: And that then I the ſaid *A. B.* my executors or adminiſtrators, ſhall not be anywiſe chargeable or liable to pay the ſaid ſeveral ſums before mentioned, or either of them, or any part thereof, to the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, but that he and they are to loſe the ſame, and every part thereof; any thing herein-before contained to the contrary thereof, in anywiſe notwithſtanding. AND it is agreed, by and between the ſaid parties to theſe preſents, that in caſe the ſaid ſhip ſhall not be returned unto the river *Thames*, from the ſaid intended voyage, at the end of fourteen months, to be accounted from the date of theſe preſents; and that, at the expiration of the ſaid fourteen months, there ſhall not be juſt proof made of the loſs happening within the time aforeſaid; that then, I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will, within twenty days next after the end and expiration of the ſaid fourteen months, well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at the place of payment aforeſaid, the ſaid ſum of 560 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *Barbadoes* as aforeſaid, and the ſaid ſum of 600 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *May* as aforeſaid; and that the ſaid *C. D.* ſhall not run the hazard and adventure of the ſaid ſum by him adventured as aforeſaid, upon the body of the ſaid ſhip, any longer than fourteen months, to be reckoned and accounted as aforeſaid. In witneſs, &c.

No. V.

Form of a Reſpondentia Bond, upon an Eaſt India *Voyage.*

KNOW ALL MEN by theſe preſents, that I, *A. B.* of in the county of , mariner, am held and firmly bound to *C. D.* of, *&c.* in the ſum or penalty of 1,000 *l.* of lawful money of *Great Britain*, to be paid to the ſaid *C. D.* or to his certain attorney, executors, adminiſtrators, or aſſigns, to which payment, well and truly to be made, I the ſaid *A. B.* do bind myſelf, my heirs, executors, and adminiſtrators firmly, by theſe preſents, ſealed with my ſeal, DATED this 23d day of *January*, in the forty-ſecond year of the reign of our Sovereign Lord *George* the third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord 1802.

WHEREAS the above-named *C. D.* on the day of the date above written, advanced and lent unto the ſaid *A. B.* the ſum of 500 *l.* upon the goods, merchandize, and effects laden and to be laden on board the good ſhip or veſſel called *The Saint George*, now riding at anchor in the river *Thames* outward bound, and whereof one *E. F.* is commander Now THE CONDITION of this obligation is ſuch, that if the ſaid ſhip or veſſel do and ſhall, with all convenient ſpeed, proceed and ſail from and out of the ſaid river *Thames*, on a voyage to any port or place, ports or places, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*; and from thence do and ſhall ſail, return, and come back into the ſaid river *Thames*, at or before the end and expiration of 36 calendar months, to be accounted from the day of the date above written, and there to end her ſaid intended voyage, (the dangers and caſualties of the ſeas excepted); AND if the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall within thirty days next after the ſaid ſhip or veſſel ſhall be returned to the ſaid port of *London*, from her ſaid intended voyage, or at and upon the end and expiration of the ſaid thirty ſix calendar months, to be accounted as aforeſaid, (which of the ſaid times ſhall firſt and next happen), well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators,

adminiſtrators, or aſſigns, the full ſum of 500*l.* of lawful money of *Great Britain*, together with the ſum of 12 *l.* of like lawful money *per* kalendar month, for each and every kalendar month; and ſo proportionably for a greater or leſs time than a kalendar month for all ſuch time, and ſo many kalendar months as ſhall be elapſed and run out of the ſaid thirty-ſix kalendar months, over and above twenty kalendar months, to be accounted from the day of the date above written; Or if, in the ſaid voyage, and within the ſaid thirty-ſix kalendar months to be accounted as aforeſaid, an utter loſs of the ſaid ſhip or veſſel by fire, enemies, men of war, or any other caſualties, ſhall unavoidably happen, and the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall, within ſix kalendar months next after ſuch loſs, well and truly account for (upon oath if required), and pay unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, a juſt and proportionable average on all the goods and effects of the ſaid *A. B.* carried from *England* on board the ſaid ſhip or veſſel, and the net proceeds thereof, and on all other goods and effects which the ſaid *A. B.* ſhall acquire during the ſaid voyage, for or by reaſon of ſuch goods, merchandizes, and effects, and which ſhall not be unavoidably loſt; then the above written obligation to be void and of none effect, elſe to ſtand in full force and virtue.

A. B. (L. S.)

Sealed and delivered,
(being firſt duly ſtamped)
In the preſence of

No. VI.

Form of a Policy of Inſurance upon a Life, for the Life of the inſured, by the SOCIETY FOR EQUITABLE ASSURANCES UPON LIVES.

THIS PRESENT INSTRUMENT OR POLICY OF INSURANCE, witneſſeth, that whereas *A. B.* of in the county of hath entered into and become a member of the ſociety for EQUITABLE ASSURANCES on lives and ſurvivorſhips, according to a certain deed of ſettlement bearing date the ſeventh day of *September*, which was in the year of our Lord one thouſand ſeven hundred and ſixty-two, and inrolled in his majeſty's court of *King's Bench* at *Weſtminſter*; and whereas the ſaid ſociety, relying upon the truth of a certain declaration, dated this day of made and ſigned by the ſaid *A. B.* touching the age, ſtate of health, and other circumſtances attending the ſaid *A. B.* have aſſured to the ſaid *A. B.* the ſum of pounds, to be paid to his executors, adminiſtrators, or aſſigns, after the deceaſe of the ſaid *A. B.* whenſoever the ſame ſhall happen; provided the ſaid aſſured does not exceed the age of years on this day of has had the ſmall-pox, and is not afflicted with any diſorder which tends to the ſhortening of life, (as in the ſaid declaration more fully is ſet forth), at and under the annual ſum or premium of

And whereas the ſaid aſſured hath executed the covenants uſually entered into by members of the ſaid ſociety, and hath paid ſuch premium for one whole year, commencing from the date of theſe preſents: Now we, whoſe names are hereunto ſubſcribed, and ſeals affixed, being two of the truſtees of the ſaid ſociety, do, for ourſelves, and our aſſigns, truſtees of the ſaid ſociety, covenant, promiſe, and agree, to and with the ſaid aſſured, and the executors, adminiſtrators, and aſſigns of the ſaid aſſured, that if the ſaid aſſured, or the aſſigns of the ſaid aſſured, ſhall yearly and every year, during the term of this aſſurance, continue to pay to the truſtees of the ſaid ſociety,

ſociety, or to any two or more of them, the annual ſum or premium aforeſaid, on or before the day of in every year; and ſhall obſerve, perform, fulfil, and keep all and ſingular the covenants, articles, clauſes, proviſos, conditions, and agreements, which on the part and behalf of the ſaid aſſured, are and ought to be obſerved, performed, fulfilled, and kept, according to the true intent and meaning of the ſaid deed of ſettlement: We, or our aſſigns, truſtees of the ſaid ſociety for the time being, will or ſhall, within ſix kalendar months, after ſatisfactory proof ſhall have been made of the death of the ſaid aſſured, well and truly pay, or cauſe to be paid, out of the ſtock or fund of the ſaid ſociety, unto the executors, adminiſtrators, or aſſigns, of the ſaid aſſured, the full ſum ſo hereby aſſured: Provided always, and it is hereby declared to be the true intent and meaning of this policy of aſſurance, and the ſame is accepted by the ſaid aſſured upon theſe expreſs conditions, that in caſe the ſaid aſſured ſhall die upon the ſeas, or ſhall go beyond the limits of *Europe*, unleſs licenſe be obtained from the court of directors, or ſhall die by his own hands, or by the hands of juſtice; or if the age of the ſaid aſſured does exceed years; or if the ſaid aſſured be now afflicted with any diſorder which tends to the ſhortening of life; or if the above-mentioned declaration contains any untrue averment, this policy ſhall be void.

In witneſs, &c.

No. VII.

No. VII.

Form of a Policy of Inſurance againſt Fire.

By the Corporation of the *Royal Exchange* Aſſurance of Houſes and Goods from Fire.

THIS preſent inſtrument or policy of aſſurance witneſſeth, that whereas *A. B.* hath agreed to pay into the treaſury of the corporation of the *Royal Exchange, London,* for the aſſurance of from loſs or damage by fire. *Now know all men by theſe preſents,* That the capital ſtock, eſtate, and ſecurities of the ſaid corporation ſhall be ſubject and liable to pay, make good, and ſatisfy unto the ſaid aſſured, his heirs, executors, or adminiſtrators, any loſs or damage which ſhall or may happen by fire to the ſaid goods aforeſaid, (except ſuch goods as hemp, flax, tallow, pitch, tar, turpentine, glaſs, china, and earthen wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gun-powder, hay, ſtraw, and corn unthreſhed), within the ſpace of twelve calendar months from the day of the date of this inſtrument or policy of aſſurance, not exceeding the ſum of and ſhall ſo continue, remain, and be ſubject and liable, as aforeſaid, from year to year, to be computed from the day of in every year, for ſo long time as the ſaid aſſured ſhall well and truly pay, or cauſe to be paid, the ſum of into the treaſury of the ſaid corporation, on or before the day of which ſhall be in each ſucceeding year, and the ſaid corporation ſhall agree thereto by accepting and receiving the ſame; which ſaid loſs or damage ſhall be paid in money immediately after the ſame ſhall be ſettled and adjuſted; or otherwiſe, if the ſaid loſs or damage ſhall not be adjuſted, ſettled, and paid within ſixty days after notice thereof ſhall be given to the ſaid corporation, by the ſaid aſſured, that then the ſaid corporation, their officers, workmen, or aſſigns, ſhall, at the charge of the ſaid corporation, at the end and expiration of the ſaid ſixty days, provide and ſupply the ſaid aſſured with the like quantity of goods of the ſame ſort and kind, and of equal value and goodneſs with thoſe burnt or damnified

damnified by fire. *Provided always nevertheleſs*, and it is hereby declared to be the true intent and meaning of this deed or policy, that the ſaid ſtock, eſtate, and ſecurities of the ſaid corporation ſhall not be ſubject or liable to pay or make good to the aſſured any loſs or damage by fire which ſhall happen by any invaſion, foreign enemy, or any military or uſurped power whatſoever. *Provided alſo*, that this deed or policy ſhall not take place or be binding to the ſaid corporation, until the premium for one year is paid, or in caſe the ſaid aſſured ſhall have already made, or ſhall hereafter make any other aſſurance upon the goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the back of this policy: Or if the ſaid *A. B.* at the time when any ſuch fire ſhall happen, ſhall be in the poſſeſſion of, or let to any perſon who ſhall uſe or exerciſe therein the trade of a ſugar-baker, apothecary, chemiſt, colour man, diſtiller, bread or biſcuit baker, ſhip or tallow chandler, ſtable keeper, innholder, or maltſter, or ſhall be made uſe of for the ſtowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the ſaid caſes theſe preſents, and every clauſe, article, and thing, herein contained, ſhall ceaſe, determine, and be utterly void and of none effect, or otherwiſe ſhall remain in full force and virtue. In witneſs whereof, the ſaid corporation have cauſed their common ſeal to be hereunto affixed, the day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, &c. and in the year of our Lord one thouſand eight hundred

N. B. This policy to be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry thereof in the books of the company.

No. VIII.

Caſes reported too late to be inſerted in their proper Places.

Viſger v. *Preſcott*, 5 *Eſp.* Rep. 184.

The inſurance of neutral property, provided it contravene no policy of the ſtate, will be good, though the court of Admiralty pronounce that there was good cauſe for the ſeizure of it, but order it to be reſtored.

GOODS, the property of perſons at *Leghorn*, were inſured on board the *Fox*, from *New York* to *Gibraltar*.—In an action to recover for a loſs by capture, it appeared that the *Fox* ſailed from *New York* on the 1ſt of *June* 1803 for *Leghorn*, with orders for the captain to touch at *Gibraltar* for information on the ſubject of war between *England* and *France*; and if, on his arrival at that place, ſuch a war exiſted, and he could not proceed to *Leghorn*, he was then to ſail to *Genoa*, *Naples*, or *Palermo*; that at the time of the ſhip's ſailing from *New York*, and at the time of the capture, *Leghorn* was garriſoned by *French* troops; that on the 12th of *July*, the *Fox* was captured by a *Britiſh* ſhip of war, and carried into *Gibraltar*, where the Vice Admiralty Court, after reſtoring the *Fox*, and all the cargo, except the goods inſured, ſtated: 'That, as it 'appeared doubtful, under all the circumſtances, whether 'the property of the inhabitants of *Leghorn* was liable to be 'treated indiſcriminately as the property of citizens of the 'French republic, the judge reſerved the final adjudication of 'the goods in queſtion for ſix months for further information 'reſpecting ſuch doubts, pronounced for juſt cauſe of ſeizure of 'the ſhip and goods, directed freight to be paid to the captain, 'and the captor's expences to be charged on the goods ſo re-'ſerved:' That on the 20th of *Auguſt*, a commiſſion iſſued for the unloading and ſale of the goods, and on the 14th of *February* 1804, a final decree was made directing the value of the goods to be reſtored to the owners, ſubjects of the king of *Etruria*, and pronounced for juſt cauſe of ſeizure.—It was objected that, as it appeared by the proviſional and final ſentences, that there was a juſt cauſe of ſeizure, this action could not be maintained, for though the underwriters inſure againſt capture generally, yet this cannot extend to captures for juſt cauſe by a *Britiſh* ſhip, according to the doctrine laid down in *Kellner* v. *Le Meſurier* (*a*)—But Lord *Ellenborough*, who tried

(*a*) Sup. 675.

the

the cauſe, ſaid, that when the Vice Admiralty Court pronounced for juſt cauſe of ſeizure, it did not adjudge that the goods inſured were condemnable; that this was a capture of neutral property, the inſurance of which contravened no policy of the ſtate, which conſtituted the principal difference between this caſe, and that which had been cited.

King v. *Glover*, 2 N. R. 206.

The commiſſions and privileges of the captain of a ſhip in the *African* ſlave trade may be inſured.

An inſurance was made by the captain of a ſhip in the *African* ſlave trade, "on his commiſſions, privileges, &c. as "may be hereafter valued."—It appeared that the inſured, beſides his wages, was entitled, for his trouble in purchaſing ſlaves on the coaſt of *Africa*, and diſpoſing of them again in the *Weſt Indies*, to 2*l. per cent.* on the groſs ſales, and 4*l.* for every 110*l.*, after deducting the above 2*l. per cent.* and the privileges and commiſſions of the other officers.—It was objected that the commiſſions and privileges of the inſured, being in the nature of wages, the policy was void, within the authority of the caſe of *Webſter* v. *De Taſſet* (*a*)—But the court determined that the rule which prohibited the inſurance of the wages of the mariners did not apply to the captain; and therefore that the plaintiff was entitled to recover.

Scott v. *Bourdillion*, 2 N. R. 213.

Rice is not corn within the meaning of the common memorandum.

In this caſe, the only queſtion was, whether rice was *corn*, within the meaning of the uſual memorandum.—On the trial, the uſage was proved to be againſt its being ſo conſidered.—The court held, that the common ſenſe of the words ought to decide, unleſs a clear uſage to the contrary were ſhewn; and that here the uſage accorded with the plain ſenſe of the words, to ſhew that rice was not intended to be exempted from partial loſs (*b*).

(*a*) Sup. 90.

(*b*) Vid. *Maſon* v. *Skurray*, ſup. 226.

Thelluſon and others v. *Sheddon*, 2 N. R. 228.

In an action for a partial loſs, upon a capture and re-capture, the plaintiff muſt produce the proceedings of the Admiralty Court to ſhew the amount of the ſalvage and expences for which the underwriters are liable.

In an action on a policy on goods from *Jamaica* to *London* to recover for a loſs by capture, it appeared that the ſhip, on her voyage, was captured, and the next day re-captured and brought back to *Jamaica*, where, no perſon claiming on behalf of the inſured, the Admiralty court ordered a ſale to pay the ſalvage and expences.—The proceedings in this court were not proved by the plaintiffs, but credit was given to the underwriters for the ſum received out of court by the agent of the inſured, and the difference only between that ſum and the invoice price of the cargo was claimed.—It was objected that the plaintiffs could not recover for this partial loſs without duly proving the proceedings in the court of Admiralty, by which alone the amount of the partial loſs could be aſcertained.—But Sir *James Mansfield*, C. J. who tried the cauſe, overruled this objection, and a verdict was found for the plaintiff for the partial loſs. —Upon a motion to ſet this verdict aſide, and grant a new trial, the court were of opinion that, though a capture ſimply proved, be evidence of a total loſs, and the reducing of it to a partial loſs might be ſaid to come in by way of defence; yet, that, where the plaintiff in the ſame breath proves a capture and re-capture, there is an end of the total loſs, and he can only claim as for a partial loſs, in which caſe he could legally make out this claim only by the production of the proceedings of the Admiralty court, which had fixed the amount of the ſalvage and expences to which the underwriters were liable.

Beckwith v. *Sydebotham*, 1 *Camp.* 116.

A witneſs who has never ſeen the ſhip, may be examined, to ſhew that, according to the ſtatement of another witneſs, who had examined her, ſhe was, or was not, ſea-worthy.—A letter from which it might be inferred that a ſhip, in a foreign port might

In an action on a policy on a ſhip, "at and from *Pictou* in "*Nova Scotia* to *Liverpool*," it appeared that the ſhip arrived at *Pictou* on the 10th of *May* 1803, and having ſailed on the voyage inſured on the 2d of *September*, met with ſtormy weather, and was obliged to put into *Halifax* on the 9th of *October*, ſo diſabled as to be unfit to proſecute the voyage.—It was objected that the ſhip when ſhe ſailed from *Pictou* was not ſea-worthy; and, to make this out, a depoſition of a man who ſurveyed her on her arrival at *Halifax*, and who deſcribed a great many deficiencies he diſcovered in her, was read. It was then propoſed to call ſome eminent ſurveyors of ſhips, who had never ſeen the ſhip in queſtion, to prove that a ſhip in the ſtate deſcribed in the depoſition, could not have been ſea-worthy on the 2d of *September*.—It was objected, that this would be aſking

the opinion of witneſſes, on an *ex parte* ſtatement, which might be falſe.—But Lord *Ellenborough*, who tried the cauſe, overruled the objection, upon the ground that the jury might be aſſiſted in matters of ſkill and ſcience by the opinion of perſons particularly converſant with the ſubject.—Another ground of defence was, that before the policy was effected, a letter had been received from the captain of the ſhip, dated at *Pillau* the 11th of *May*, in which he ſtated the damage the ſhip had ſuſtained on the outward voyage, and deſcribing her as being unſea-worthy and in need of great repairs, which letter ought to have been communicated to the underwriters, as it would have ſhewn that the ſhip muſt be detained a much longer time than would be neceſſary to take in her cargo; which would have the effect of turning a ſummer riſk into a winter one.—But Lord *Ellenborough* held, that if it were neceſſary to diſcloſe this letter, as indicating the time when the ſhip might ſail, it would in all caſes be neceſſary to inform the underwriters where any repairs are wanting; that if they wiſhed for information on this ſubject, they might have aſked for it; and if they would only inſure a voyage during a particular ſeaſon, they ought to require a warranty that the ſhip ſhould ſail by a certain day; and therefore that the communication of the letter was as little neceſſary to ſhew the probable ſtay of the ſhip at *Pillau*, as to ſhew whether ſhe was ſea-worthy at the commencement of the voyage.

be detained by the want of repairs, need not be communicated to the underwriters.

In an action on a policy on the ſhip *Ganges* and her ſtores, to and from the Southern Whale fiſhery, with liberty to ſeek, join, and exchange convoys, it appeared that the ſhip ſailed from the *Downs* under convoy of the *Fury* ſloop of war, on the 12th of *December* 1805 for *Portſmouth*, and in her paſſage was captured.—The defence was, that a letter from the captain, dated the 5th of *December*, ſtating that he was to ſail under convoy of the *Fury*, and received on the 6th, had not been communicated to the underwriters before effecting the policy, which was not till the 12th or 13th of *January*, the broker merely ſaying, that the ſhip had ſailed about three weeks.—To this two anſwers were given; 1ſt, that the defendant on the 12th of *March* 1806, after reading this letter, together with ſeveral others from the captain, while a priſoner in *France*, giving a full account of all the circumſtances of the caſe, had adjuſted the policy as for a total loſs, which it was contended was concluſive; and 2dly, that the letter itſelf was not material.—Lord *Ellenborough*,

Herbert v. *Champion*, 1 *Campb.* 134

An adjuſtment ſigned even upon a full diſcloſure of all facts, is not concluſive.

who tried the cauſe, ſaid,—"There are two queſtions here to be conſidered; as to the concluſiveneſs of the adjuſtment, and as to the materiality of the letter. The caſes are clearly diſtinguiſhable, where, upon a diſpute, the money is paid, and where there is only a *promiſe* to pay. If the money be actually paid, it cannot be recovered back, without proof of fraud; but a promiſe to pay will not, in general, be binding, unleſs founded on a previous liability (*a*). An adjuſtment is an admiſſion, on the ſuppoſition of the truth of certain facts ſtated, that the inſured is entitled to recover on the policy. Perhaps, if properly ſtamped, it might be declared on as a promiſſory inſtrument. Here it is a mere admiſſion, and there is no conſideration for the promiſe it is ſuppoſed to prove. An underwriter muſt make a ſtrong caſe, after admitting his liability; but, until he has paid the money, he is at liberty to avail himſelf of any defence which the facts or the law of the caſe will furniſh." 2dly, Reſpecing the letter, his lordſhip directed the jury to conſider whether it would have had the effect of inducing the underwriters to regard the *Ganges* as a miſſing ſhip, and require an increaſed premium; or, whether it might not have excited their curioſity, or led them to ſome uſeful information.—The jury found a verdict for the plaintiff.

Raine v. *Bell*, 9 *Eaſt* 195.

A ſhip may trade, where ſhe has liberty to *touch*, without expreſs permiſſion, provided this occaſion no delay, deviation, or additional riſk.

The ſhip *Rio Nova* and freight were inſured "From her "loading port or ports on the coaſt of *Spain* to *London*, with "liberty to *touch and ſtay* at any port or place whatſoever, "without being deemed a deviation."—It appeared that by the long continuance of the voyage from port to port in *Spain*, and the difficulty of obtaining proviſions on the coaſt at that time, the ſhip's proviſions ran very ſhort, which obliged her to put into *Gibraltar* for a ſupply; that while the ſhip lay there for that purpoſe the captain received on board ſome cheſts of dollars on freight, but that this occaſioned no delay beyond that which

---

(*a*) The adjuſtment has been holden to amount to *primâ facie* evidence of all the facts which conſtitute a previous liability, ſubject to be impeached by fraud, or miſconception of the law or fact. Vid. ſup. b. 1. c. 14. § 3. where the effect of an adjuſtment is diſcuſſed at large.

was

was juſtified by the neceſſity.—In an action to recover for a loſs by the perils of the ſea off the coaſt of *Cornwall*, in the home-ward voyage, it was objected on the part of the underwriters on the authority of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, that the taking in of the additional cargo of dollars at *Gibraltar*, where there was no liberty to *trade*, avoided the policy.—But the court determined that as this occaſioned no delay, nor any increaſe or alteration of the riſk, the plaintiff was entitled to recover —Mr. Juſtice *Lawrence*, in delivering his opinion, ſeemed to queſtion the authority of *Stitt* v. *Wardell*.—Mr. Juſtice *Le Blanc* ſaid, "That the reaſon why a liberty is ſometimes expreſsly reſerved for a ſhip to touch, ſtay, and trade, in the courſe of the voyage, is not becauſe this is impliedly excluded in every policy in which no ſuch liberty is reſerved, but to juſtify the *delay* in trading there; and that, where no delay is occaſioned by the trading, he could ſee no reaſon why the court ſhould imply a condition which the parties had not made."

A liberty to trade is given only to juſtify the *delay*, not to authorize the *trade*.

Barker v. *Blakes*, 9 *Eaſt* 283.

A policy, dated the 4th of *Auguſt* 1803, was effected on a quantity of oil, the property of the plaintiff, an *American* citizen, reſident there, "At and from *New York* to *Havre de Grace*," on board the *Hannah*, an *American* ſhip, duly documented. The ſhip ſailed on the 4th of *July* 1803, and in the courſe of her voyage was arreſted on the 17th and ſent into *Briſtol*, where ſhe arrived on the 30th. The Court of Admiralty, on the 8th of *October*, ordered the ſhip and cargo to be reſtored, ſubject to freight and expences, but without coſts or damages; except a box of books, ſome bark, and ſome whalebone, which were condemned as *French* property. The agents of the inſured abandoned the oil in queſtion on the 14th of *October*. They were apprized of the detention of the veſſel and the ſuit in the Admiralty ſoon after they reſpectively took place; but were not parties to the ſuit, nor did they know of the reſtoration of the ſhip and cargo till the 17th of *October*, three days after the abandonment. On the 6th of *September*, the *Britiſh* Government declared *Havre de Grace* to be in a ſtate of blockade. The captain of the *Hannah* refuſed to proceed to *Havre*, and returned to *New York*, leaving the oil at *Briſtol*, where it was ſold by agreement without prejudice to the queſtion; and the loſs amounted to 45*l.* 2*s.* 8*d.* *per cent.* of which the freight and expences of reſtoration amounted to 20*l.* 19*s.* *per cent.*—Upon this

A quantity of oil, the property of a neutral on board a neutral ſhip, is inſured from a neutral to an enemy's port. The ſhip is arreſted and brought to *England*, having enemy's goods on board. The ſhip and cargo are reſtored, except the enemy's goods, which are condemned.—The port to which the oil was deſtined is afterwards put under blockade, ſo that the ſhip cannot proceed thither:—The inſurance was legal; the ſeizure and detention amounted to a loſs of the voy-

age, and would entitle the inſured to a total loſs: — But an abandonment, five weeks after the blockade had rendered the further proſecution of the voyage impracticable, was out of time, and the inſured, therefore, entitled to a partial loſs only.

this caſe it was objected on the part of the underwriters, 1ſt, That the loſs did not ariſe from any riſk within the policy; for, as ſome of the goods were enemies' property, *the detention was lawful*; and that the policy did not protect the inſured againſt the effects of a lawful *Britiſh* capture or detention. 2dly, That, ſuppoſing the plaintiff entitled to recover any thing, it could only be a partial loſs, the abandonment being out of time.—The Court determined, 1ſt, That the mere act of carrying enemies' goods on board was no breach of neutrality; that the *American* was at liberty to purſue his commerce with *France*, and to be the carrier of goods for *French* ſubjects, at the riſk, indeed, of having his voyage interrupted by the goods being ſeized, or the veſſel itſelf detained; that the indemnity ſought was not ſecured by the policy to an enemy, or to a neutral forfeiting his neutrality; but to a neutral, as ſuch, againſt the conſequences of an act juſtifiably done in the exerciſe of his neutral rights, and as juſtifiably controlled on our part, in the exerciſe of our belligerent rights againſt enemies' property found on board; and that the voyage and the commerce in which the veſſel was engaged not being of an hoſtile deſcription, nor in any manner forbidden by the law or policy of this country, there was no ground for the firſt objection. 2dly, That the *loſs of the voyage*, (the only deſcription of loſs that could be contended for in this caſe) was occaſioned by the detention in queſtion, which contin ed till after the blockade, which rendered the further proſecution of the voyage impracticable, took place, would have entitled the inſured to recover as for a total loſs, if he had abandoned in due time: but that the abandonment on the 16th of *October*, above five weeks after the blockade of *Havre* (the lateſt event to which the loſs of the voyage could be referred) had been publicly notified, was not in due time; and that, therefore, the amount of the loſs muſt be reſtricted to 20*l.* 19*s. per cent.* the amount of the freight and expences, to which the inſured was ſubjected by the ſentence of the Court of Admiralty.

Norvill v. *St. Barbe*, 2 N. R. 34.

A ſhip is licenſed by the *India Company* for three

The ſhip *Venus* was inſured "At and from the *Cape of* "*Good Hope* to *Botany Bay*, *Port Jackſon*, and all other ports "and places in *New South Wales*, &c. and all places beyond "*Cape Horn*, the *Eaſt Indies*, *Perſia*, *China*, the north-weſt "coaſt of *America*, and to all places whatſoever after her de-

"parture.

" parture from the *Cape of Good Hope*, and at all times, until " her ſafe arrival and *final diſcharge* at *Canton*; with leave to " ſell, reſell, &c. and to load, unload, &c. at any port or " place, without inquiring into the regularity of her proceed- " ings, and to continue until her arrival as above; with leave to " touch and trade at all ports and places in the *Eaſt Indies*, " *Perſia*, and *China*, in whatever latitude or longitude, particu- " larly between *Cape Horn* and *Kamſkatka*, and all iſlands, after " her departure from *Botany Bay*; and, after her final diſcharge, " on her homeward voyage to *England*." (*a*)—A licence was obtained from the *Eaſt India* Company, dated the 29th of *October* 1800, for the ſaid ſhip, for a voyage into the *Pacific Ocean*, to ſell her cargo on the north-weſt coaſt of *America*, and from thence to *Japan*, *Koma*, and *Canton*, and there diſpoſe of her cargo, obtained on the north-weſt coaſt of *America*, and remit the proceeds through the *Company*'s treaſury to *London*, and then return to *England*; but not to touch at any place in *China* but *Canton*, with a proviſo that it ſhould not authorize the *Venus* to continue within the Company's limits for more than *three years*. The *Venus* arrived at *Botany Bay* in *October* 1801, from whence ſhe ſailed to *Otaheite* for a cargo of pork, with which ſhe returned to *Botany Bay*, and again ſailed from thence in *February* 1803, but was never heard of more.—Upon the trial it was objected on the part of the defendant that it was evident from the date of the ſhip's leaving *Botany Bay* the ſecond time, that the voyage deſcribed in the licence and the policy had been abandoned, and that therefore the underwriters were diſcharged—Sir *James Mansfield*, C. J., who tried the cauſe, left it to the jury to conſider whether it was poſſible for the ſhip, after leaving *Botany Bay* the ſecond time, to go to the north-weſt coaſt of *America*, from thence to *Canton*, and from thence out of the Company's limits, on her return to *England*, within the three years limited by the licence.—The jury found a verdict for the plaintiff.—Upon a motion for a new trial, it was contended, on the part of the defendant, that, in the caſe of a deviation, the *terminus ad quem* remains, but the courſe thither is changed; but that, where the *terminus ad quem* is changed, it is not a deviation, but an abandonment of

years to take a cargo to the *Pacific Ocean*, and the north weſt coaſt of *America*, there to trade and purchaſe a new cargo, to ſail therewith to *Canton*, and there diſpoſe thereof, and remit the proceeds to *England* through the *Company*'s treaſury. The ſhip ſails to *Botany Bay*, from thence to *Otaheite* returns to *Botany Bay*, and ſails again from thence, but is never heard of after.—Though ſhe was conſidered as having abandoned all intention of proceeding to *Canton*, this was not an abandonment of the voyage, which ſtill continued legal, though the whole voyage deſcribed in the licence, became impracticable, and the underwriters were held liable.

(*a*) This is a ſhort abſtract of the farago of words in which the voyage in this moſt ſingular policy was deſcribed.

the voyage; and that ſuch an abandonment, at whatever time it takes place, whether before or after the arrival of the ſhip at the dividing point, diſcharges the underwriters. That in this caſe, the *terminus ad quem* was *Canton*, and this being abandoned, the terms of the licence were violated. But the court determined that the verdict ſhould ſtand. They held, that if it ſhould happen that the ſhip, could not, by the diſpoſal of her cargo, raiſe funds to purchaſe furs or other goods on the north-weſt coaſt of *America*, or in the *Pacific Ocean*, to make it worth while to go to *Canton*, there was nothing in the licence from which it muſt of neceſſity be implied that ſhe was to go to *Canton* at all events.

GENERAL INDEX.

ABANDONMENT. Page.

Nature of - - - 559
Whether coeval with inſurance - - ib.
Probable origin of - - - 560
Whether carried too far - - ib.

In what caſes it may be - - 562, 580
Upon what principle - - ib.
When permitted in *France* - - ib.

Upon capture and arreſt - - - 563
When it may be - - ib. 564, 5, 836
It may be upon an arreſt or embargo by a friendly power - - - - 564
But not upon a ſmall temporary hindrance - 569
When prevented by recapture - - 565
When not - - - 566, 568
A capture does not neceſſarily make a total loſs, nor recapture prevent it - - 565, 579
The inſured is not *obliged* to abandon - 564, 570
Upon a *wager* the inſured cannot abandon - - 564
Whether a loſs be total or not depends on the final event - - - 565, 571
The *jus poſt liminii* continues for-ever - - 573
The inſured cannot, by abandoning, turn a partial into a total loſs - - - 570, 583
Nor can he abandon but while it is a total loſs 571, 574
Nor after the ſhip's arrival, unleſs the voyage be loſt 572
He cannot abandon five weeks after a blockade had rendered the further proſecution of the voyage impracticable - - - 836
While the ſhip is in the enemy's hands it is a total loſs - - - - 573

ABANDONMENT—*continued.* Page.

Upon capture and arreſt.

But the property reverts upon a recapture - 573
There is no veſted right to a total loſs till abandonment - - - 575
If the ſhip be recovered after a long detention, it is not a total loſs, even on a wager policy - ib.
When the ſhip is ſafe, and the voyage not loſt, the inſured cannot abandon - - 577
If, upon a recapture, the captain ſell the ſhip and cargo, as being the beſt for all concerned, yet the inſured may abandon - - 578
If the captain purchaſe from the recaptors, the ſum paid is only a partial loſs - - 581
But the money paid on ſuch purchaſe cannot be charged to the underwriters, being a ranſom 596, 598

In other caſes - - - 582
Shipwreck is *prima facie* a total loſs - ib.
But a ſtranding, of itſelf, is not ſo - - ib.
No injury, however great, is a total loſs, if the ſhip arrive - - - 583
Or ſurvive the term inſured - - 584
But whenever the voyage is loſt, the inſured may abandon - - - 585
As where a ſhip cannot be repaired, or another procured - - - ib.
Or where the cargo is reduced in value to leſs than the freight - - - 587

Within what time it may be - - 589
In foreign countries - - - ib.
In *England* - - - - ib.
At what time the notice muſt be given ib. 592, 835, 6
Effect of neglecting to abandon - - 590, 592
Till notice of the loſs, the captain's acts will not prejudice the right to abandon - - 592
When the captain ſhall be deemed the agent of the underwriters - - ib.
What act of the inſured will preclude his right to abandon - - - 593
He muſt make his election ſpeedily - 594, 836
He muſt not firſt treat the loſs as *partial*, and then abandon - - - ib.
The inſurers requiring an abandonment of too much, will not excuſe the want of an abandonment - 595

If

ABANDONMENT—*continued.* Page.

Within what time it may be.

If, in the caſe of a total loss, the underwriters prevent an abandonment, they muſt pay a total loſs - 598

When the inſured may abandon upon a preſumed loſs - - - 599

Form of - - - ib.

There muſt be ſome notice of it - ib. 600

There is no particular form of it - - 599

It muſt be explicit - - - ib.

And unconditional - - - 601

And not for *part* - - - 600

When a particular article may be abandoned - ib.

Effect of - - - 601

How it transfers the property - - ib.

To what time it relates - - ib.

Whether the abandonment of a ſhip transfers the freight - - - 602

It can only be in proportion to the ſum inſured 603, 608

What ſhall be the concurrent claims of inſurers, and borrowers on bottomry - - ib.

The underwriters, and not the lender, on bottomry, have the legal title - - - 608

To whom the freight earned after abandonment ſhall belong, where ſhip and freight are ſeparately inſured, and ſeparately abandoned 604, 606, 607, 608

If there be a policy on ſhip and cargo, and a ſeparate one on each, how the claims of the different ſets of underwriters ſhall be aſcertained - 609

What ſhall be the claim of the underwriters, where the inſured receives compenſation after abandonment - - - 611

Or where the ſhip arrives ſafe - - ib.

Or the thing inſured is recovered - - ib.

In ſuch caſe, the inſured is not bound to take it back 612

Abandonment once made and accepted is irrevocable 613

But if it be not upon a ſufficient ground, it will be void - - - - ib.

Diſpoſal of the effects abandoned - - 614

Duty of the inſured to ſave all in his power - ib.

Duty of the captain and ſailors - - 615

The captain's power over the things ſaved - - ib.

When he ſhall be deemed the agent of either party - ib.

Page.

ABANDONMENT (of the voyage.)
What ſhall be - - - 615
What not - - - 837

ACCEPTANCE OF BILLS.
When this will conſtitute an inſurable intereſt - 308

ACTION.
As to the form of action on a policy of inſurance, Vid. *Proceedings* (*Declaration*).

ADJUSTMENT OF LOSSES.
What - - - 617
What ſhall be deemed a fair indemnity - - 648
How the quantity of damage is aſcertained 618
Upon a valued policy - - - ib.
Upon an open one - - ib.
Where the loſs conſiſts of an entire individual - 619
Where part of the goods are ſaved - - ib.
Where all are damaged - - - 619
Where only one of ſeveral articles inſured is put in riſk ib.
Where the policy is free of average under ſo much *per cent.* - - - ib.
How the loſs ſhall be appreciated - - ib.
What is deemed the true value of a thing - ib.
The firſt price is not always the true value - 621
Different modes of appreciating a loſs - - ib.
How goods ſhall be valued in ſettling an average - ib.
How this is done in *France* - - ib.
How in *England* - - - 622
The inſurer is not to be involved in the riſe or fall of the market, or the courſe of exchange - ib. 628
How a ſhip ſhall be valued - - 623
How damage to goods ſhall be appreciated - ib.
The rule is the ſame in a riſing or falling market - 626
What is the meaſure of indemnity ſecured by the policy - - - 628
The amount of the loſs ought not to depend on after ſpeculations - - - 629
The relative prices of ſound and damaged goods muſt be taken from the groſs produce, not from the net proceeds - - - ib.
The computation muſt be made upon the real intereſt, not the value - - - 631

ADJUSTMENT OF LOSSES—*continued.* Page.

Effect of - - - 632
It is *primâ facie* evidence againſt the underwriter - ib.
This rule objected to - 633
Vindicated - - - ib.
But the claim may be impeached after adjuſtment - 634
An adjuſtment is not concluſive, though made upon a full diſcloſure of all facts - - 833
An adjuſtment may be given in evidence in an action on the policy - - - 639
How the claims of different ſets of underwriters ſhall be adjuſted upon an abandonment - - 609

ADMIRALTY.
Vid. *Court of Admiralty.*

ADMISSIONS.
The neceſſity of mutual admiſſions in actions on commercial queſtions - - - 703

AGE.
Warranty of - - - - 769
Vid. *Lives* (*Inſurance upon.*)

AGENT.
Where he may inſure in his own right - 115, 310
His authority - - 296
A ſhip's huſband, as ſuch, is not an agent, ſo as to enable him to inſure - - 297
In what caſes an agent is bound to inſure for his principal - - - - ib.
In what caſes an action will lie againſt him for negligence - - - ib.
He is liable, if he limit the broker to too ſmall a premium - - - 298
Even a voluntary agent is liable - - ib.
An agent is liable if he do not furniſh the broker with all his inſtructions - - 299
How the principal ſhall recover in an action againſt an agent - - - ib.
Duty of an agent as to repreſentations made to the underwriters - - 451
Any fraud or concealment by him will avoid the policy though the inſured be innocent - - 300
But if he act in the uſual manner it is ſufficient - ib.

AGENT—*continued.* Page.
He ought not to be an underwriter - - 301
If he pretend that he effected a policy, trover will lie againſt him for it, aud the loſs recovered - - ib.
A general Agent may inſure without a particular order - - - - 218
Where the maſter ſhall be deemed the agent of either party, Vid. *Abandonment* (*Diſpoſal of effects*).
When a general agent may inſure in his own name, Vid. *Policy* (*Form—Name of inſured*).
What ſhall be ſufficient proof of the authority of an agent to underwrite for his principal - - 707

ALIEN.
When a natural-born *Britiſh* ſubject may become a citizen of a foreign ſtate for the purpoſes of trade - 71

ALIEN ENEMY.
Vid. *Enemy*.

AMERICA.
Diſcovery of - - - 13
How the trade between the *Americans* and the *Britiſh* ſettlements in *India* is regulated, Vid. *Voyage* (*illegality of*).

ANIMALS (death of).
When a loſs within the policy - 555
Vid. *Loſs* (*By the death of animals*).

APPORTIONMENT.
When the premium may be apportioned, Vid. *Return of Premium* (*Riſk not commenced*).

ARBITRATION.
Vid. *Proceedings* (*In what courts*).

ARMED NEUTRALITY.
Vid. *Northern Confederacy*,—*Warranty*, (*Neutrality*).

ARREST OF PRINCES.
Vid. *Loſs* (*By detention of princes*).

ASSIGNMENT (of fire policy).
How made, Vid. *Fire*, (*Inſurance againſt*).

Page.

"AT AND FROM."
How theſe words are conſtrued, Vid. *Riſk, (duration of)*.
Under a policy "*at and from*" an iſland, the ſhip is protected from port to port in the iſland - 358

AVERAGE.
Vid. *Loſs (By average contributions)*.

AVERMENT.
Of intereſt, vid. *Proceedings (Declaration)*.
Of loſs, vid. ib.

BANKRUPT.
How an inſured or a lender on bottomry ſhall claim againſt the eſtate of a bankrupt inſurer or borrower 731

BANK SAUL.
Vid. *Riſk (On ſhip)—Proceedings (Trial)*.

BARCELONA.
Ordinance of - 20

BARRATRY.
Vid. *Loſs (By Barratry)*.

BEANS.
Are comprehended under the word *corn* - - 223

BELIEF.
Whether matter of belief amounts to a repreſentation, 454
Vid. *Repreſentation*.

BILL OF HEALTH.
Vid. *Documents*.

BILL OF LADING.
Vid. *Documents,—Intereſt (Inſurable)*.
When the indorſee of has an inſurable intereſt - 105

BILL OF PARCELS.
When proof of intereſt - - 709

BLOCKADE.
Commerce with a place blockaded - - 80
The effect of a notification of a blockade 80, 81, 835
Of the port of deſtination, when a loſs of the voyage 835,6

BOTTOMRY AND RESPONDENTIA. Page.
When an insurable interest, Vid. *Interest (Insurable)*.
Nature and form of this contract - - 733
Bottomry defined - - - ib.
Derivation of the term - - - 734
Distinction between bottomry and respondentia - ib.
The lender has no *lien* on the homeward cargo - 735
Its antiquity - - - ib.
Whether the *nauticum fœnus* of the *Romans* differed materially from bottomry - - - 736
Pecunia trajectitia - - - ib.
How bottomry differs from a simple loan - - 736
Analogy between bottomry and insurance - - 737
How they differ - - - ib.
Utility of this contract - - - 738
Not now much in use in *England* - - ib.
Form of it - - - ib.
How the interest must be reserved - - 739
Whether equity would supply the omission - ib.
Parties to the contract - - 740
Who may lend on bottomry - - ib.
Who may borrow - - - ib.
When the captain may hypothecate the ship - ib.
The owners are liable for money taken up by him, even in the place where they reside - - ib.
To what extent he may borrow in a foreign country 741
Whether the lender be bound to look to the application of the money - - - ib.
Whether the loan may be to an alien enemy - ib.
Thing hypothecated - - 742
On what things money may be lent - - ib.
The borrower may take the money on board with him - - - - ib.
But the money, or its equivalent, must be exposed to the perils of the sea, at the risk of the lender - ib.
Wagers in the form of bottomry loans are permitted in *Italy* - - - - 743
Prohibited in *France* - - - ib.
Prohibited in *England*, on *East India* voyages - ib.
Whether a wager in the form of a bottomry loan be a legal contract at common law - - 744
Loans on foreign *East India* ships prohibited - 745

BOTTOMRY AND RESPONDENTIA—*continued.*

Thing hypothecated. Page.
Whether money may be lent to a *Britiſh* ſubject on goods on board an *American Eaſt India* ſhip - 745
In *England* money may be lent on freight - 746
Sailors may borrow on their goods on board, not on their wages - - 747
Whether money may be lent on a ſhip or goods already in riſk - - ib.
Principal and marine intereſt - 748
Of what the loan may conſiſt - ib.
Upon what ground the marine intereſt is deemed legal - - ib.
It can only be due where the riſk has commenced 749
Till the riſk be commenced, it is a ſimple loan ib.
What allowance the lender ſhall have where the riſk has not commenced - 750
At what time the marine intereſt ceaſes - ib.
Whether it be legal to contract for ſo many months' intereſt at all events - 751
When common intereſt begins to run - 752
Perils or riſks to which the lender is liable 753
The lender muſt run the ſea riſk - ib.
The perils are nearly the ſame as in inſurance ib.
They include capture and piracy - ib.
Nothing ſhort of a total loſs will diſcharge the borrower - - 754
The lender is not liable for the internal defect of the thing - - 755
Nor for the act of the owner or Captain - 756
Nor for ſmuggling - ib.
Nor for any loſs, if the ſhip do not ſail on the voyage deſcribed - - 757
Or if ſhe deviate without neceſſity - ib.
Or be changed without neceſſity - - 758
But her being preſſed into the King's ſervice will excuſe a deviation - - 757
What ſhall be the duration of the riſk - 758
Whether the lender be liable to general average 760
By the law of merchants - - ib.
By the law of *England* - - 761
The lender upon a *Daniſh* ſhip is liable - - 762
And the Inſurers on ſuch loan muſt make good the loſs 763

Whether

BOTTOMRY AND RESPONDENTIA—*continued.* Page.

Whether the lender be entitled to the benefit of salvage - 764
Upon *East India* voyages he is - - ib.
Whether upon other voyages - ib.
How bottomry loans ſhall be inſured 117, 118, 128, 317
The borrower cannot underwrite a policy on the loan 118
If goods be partly inſured, and money borrowed on the reſidue, what ſhall be the effect of abandonment 608
When the claim of a lender is preferred to that of an inſurer - - 609
Vide *Abandonment (Effect of)*.
What remedy the lender ſhall have againſt the eſtate of a bankrupt borrower - - 731

BRITISH SUBJECT.
When he may become the ſubject of a foreign ſtate for the purpoſes of commerce - - - 183

BROKER.
Vide *Inſurance Broker*.

BULLION.
When it may be inſured "*without further proof of intereſt than the policy*" - 132, 320, 612
If clandeſtinely exported a policy on it will be void 320

CABLE.
When the loſs or deſtruction of it ſhall be a general, when a particular, average - - 540

CAPTAIN.
May inſure his goods on board - - 91
When he may inſure his prize - - 108
Vide *Intereſt (Inſurable)*.
Whether his ignorance or inattention be a peril of the ſea - - - - - 487
Whether his miſtake be a riſk within the policy 487, 490
His power as agent for all concerned 500, 578, 580, 615
Money paid by him upon a compromiſe, to obtain reſtitution of the ſhip, is a loſs within the policy 501, 502
His duty in ſettling averages - - 544
Vide *Loſs (By average contributions.)*

CAPTAIN—*continued.* Page.

His power in borrowing money and hypothecating the ſhip - - 740

Vide *Bottomry* (*Parties to the contract*).

His duty in the ſtowage, care, and delivery of the goods - - 141

For what loſſes he ſhall be liable - - ib.

Vide *Riſk* (*Owners and maſter liable*).

How he ſhall be named in the policy - - 312

Vide *Policy* (*Form and requiſites*).

When he ought to hire another ſhip - - 171

When a legal diſqualification of him ſhall avoid the policy 177

Vide *Ship* (*Conduct of*).

His cloths are not comprehended under the denomination of "*goods*" - - 319

Vide *Policy* (*Requiſites—Subject matter*).

CAPTURE.

Loſs by—Vide *Loſs* (*By capture*).

CARRIERS.

Liability of the owners and maſters of a ſhip *as carriers* - - 243, 4

CERTIFICATE.

Of miniſters and churchwardens, &c. upon a loſs by fire—Vide *Fire* (*Proof of loſs*).

CESTUI QUE TRUST.

In what caſe he has an inſurable intereſt - 114

CHARTER-PARTY.

Vide *Documents*.

CHANGING RISK.

Vide *Riſk* (*Changed*).

CHANGING SHIP.

Vide *Ship* (*Changing*).

CICERO.

His rule reſpecting concealment - 479

Vide *Concealment*.

CIVIL COMMOTION. Page
The effect of theſe words in a policy againſt fire—Vide *Fire* (*Riſk*).

CLOTHES (Captain's).
Inſurance of - - - - 319
Vide *Captain*.

COIN.
How inſured - - 319
If clandeſtinely exported, a policy on it will be void - 320

COLLISION.
Vide *Loſs* (*By Colliſion*).

COLONIAL TRADE.
Vide *Subject Matter* (*Prohibited colonial trade*).

COLONY.
Enemy's—Vide *Enemy*,—*Commerce*.
Britiſh—Vide *Subject Matter* (*Prohibited colonial trade*).

COMMERCE (maritime).
Growth of in modern *Europe* - - 8
Cauſes which contributed to its revival - ib.
Cruſades - - 9
Mariners compaſs - - ib.
Corporations - ib.
Of the *Lombards* - - - - 10
Of the *Hanſeatic League* - - 11
Of the *Flemings* and *Dutch* - - ib.
Of the *Britiſh* - - - - 12
Checked by monopolies - - 13
As to commerce with the *Britiſh* colonies—Vide *Subject matter* (*Prohibited colonial trade*).
As to commerce with the enemy—Vide *Loſs* (*By capture*),—*Enemy*.

COMMISSION.
Whether expected commiſſions upon a conſignment be an inſurable intereſt - - 138
The commiſſions and privileges of the captain in the *African* ſlave trade is an inſurable intereſt - 831
Vide *Intereſt* (*Wager policies*).

COMPENSATION.
If compenſation be made after a loſs paid, it ſhall go to the inſurer - - 611
If before, the inſured ſhall not recover - - 777

COMPROMISE. Page.
Vide *Loss (By capture)*.

CONCEALMENT.
Its nature and effects - 464
Avoids the contract - - ib.
Though it be innocent - - 465
The insured is bound to disclose all material circumstances - - ib.
When concealment by an agent is fatal - - 466
When material - 467
Whatever respects the state of the ship, time of sailing, &c. is material - - ib.
A fact from which the time of sailing may be inferred - - - 469
That the ship is intended for a service of peculiar danger - - - - 471
A material concealment is fatal, though the broker thought it immaterial - - ib.
Even *doubtful rumours* respecting the safety of the ship ought to be disclosed - - ib.
Non-compliance with an ordinance, though made contrary to the law of nations, is material - - 472
What things need not be disclosed - - 473
Cicero's rule - - ib.
How understood - - ib.
It is unnecessary to disclose what the underwriter knows or ought to know - - ib.
Or what lessens the risk - - ib.
Or general topics of speculation - - ib.
Or matters which are equally open to both parties 474
Or matters for which there is an implied warranty - 475
It is sufficient to shew the true state of the ship when the *last* accounts left her, though a prior less favourable account had been received - - 477
A letter to shew that the ship might be detained in a foreign port for repairs, need not be communicated 833
It is unnecessary to disclose a circumstance made material by a foreign ordinance - - - 478
Or the probability of an attack - - 479

CONDEMNATION.
Sentence of—Vide *Warranty (Neutral)*.

CONSIGNEE. Page.
When he ſhall have an inſurable intereſt in the conſignment—Vide *Intereſt* (*Inſurable*).

CONSOLATO DEL MARE.
Vide *Marine Law.*

CONTAGION.
Vide *Infection.*

CONTRABAND OF WAR.
Vide *Subject Matter* (*Contraband of war*).

CONTRIBUTION.
Vide *Average.*

CONVOY.
When a ſhip may deviate to join convoy - 355
What ſhall be a ſailing with convoy—Vide *Warranty* (*Convoy*).

CORN.
Vide *Riſk* (*Memorandum*).

CORPORATIONS.
Contributed to the revival of commerce - 9

COURSE OF EXCHANGE.
Vide *Adjuſtment of Loſſes* (*How loſs appreciated*).

COURT OF ADMIRALTY.
For the effect of the ſentence of—Vide *Warranty* (*Neutral*).
Ought to proceed on the *jus gentium* where not altered, as between the parties, by particular treaties 419
Has juriſdiction in caſes of inſurance in ſome countries, not in *England* - - - 678
Its ſentence in a proceeding *in rem*, is concluſive in all courts, and againſt all perſons - - 424
But only ſo upon the points which it profeſſes to determine - 411

COURTS OF EQUITY.
Have no juriſdiction in queſtions of inſurance - 679

COURTS (foreign).
Authority of their ſentences, Vide *Warranty* (*Neutral*), —*Foreign judgment.*

COURT OF POLICIES OF INSURANCE. Page.
When and for what reaſon erected - - 26
Its powers enlarged - - ib.
Fallen into diſuſe - - 27

CRUISE.
When cruiſing in queſt of prize is barratry - 520
When a deviation - - - 196
How a liberty to cruiſe is conſtrued - - 199
Vide *Letters of marque*,—*Voyage* (*Deviation from*).

CRUSADES.
Contributed to the revival of commerce - 9

DATE (of the policy).
Vide *Policy* (*Requiſites—Date*).

DECLARATION.
For the form of a declaration on a policy—Vide *Proceedings* (*Declaration.*)

DELAY.
When it ſhall amount to a deviation—Vide *Voyage* (*Deviation from*).

DEMURRAGE.
When a loſs within the policy - - 721

DETENTION OF PRINCES.
Vide *Loſs* (*By detention*).

DEVIATION.
Vide *Voyage* (*Deviation from*).

DOCUMENTS.
Neutral ſhips uſually require
Paſſport, ſea-brief, or ſea-letter - - 406
Proof of property - - 407
Muſter-roll - - ib.
Charter-party - - ib.
Bills of lading - - ib.
Invoices - - - 408
Log-book - - - ib.
Bill of health - - - ib.

DOCUMENTS—*continued.* Page.
But the want of any of theſe is only preſumptive evidence againſt the ſhip's neutrality - - 408
The effect of a ſhip's ſubjecting herſelf to detention for want of any of theſe - - 410
How the habitation of the Captain ſhall be ſet forth in the paſſport - - 430
Vide *Warranty* (*Neutral*).

DOUBLE INSURANCE.
Vide *Intereſt* (*Double Inſurance*).

DURATION OF THE RISK.
Vide *Riſk* (*Duration of*).

EAST INDIA COMPANY.
Vide *Voyage* (*Illegal*),—*Intereſt* (*Wager*).

EAST INDIA TRADE.
Vide *Voyage* (*Illegal*).

EAST INDIA VOYAGE.
Vide *Voyage* (*Illegal*),—*Riſk* (*Duration of*).

EAST INDIES.
Diſcovery of paſſage thither by ſea - - 13
Trade of the Americans thither - - 68

EMBARGO.
What, and by what authority laid - - 508
Is a loſs within the policy, whether it be legal or not - - ib.
The inſurance of a trade in contravention of it is illegal - - - 82
The ſuſpenſion of the power of diſpoſal is a total loſs - - - 510
It is *prima facie* a total loſs for which the inſured may abandon - - - 563
Vide *Abandonment* (*Upon capture*).
It will not excuſe the non-compliance with a warranty - - 351, 352
Vide *Warranty* (*To ſail by a given day*).
Wages and proviſions during an embargo cannot be recovered on a policy on the ſhip - - 721
Vide *Proceedings* (*Trial*).

EMBEZZLEMENT.
When the owners and maſter ſhall anſwer for 241

ENEMY. Page.
As to the inſurance of enemy's property, Vide *Parties to the Contract* (*Inſured—Enemy*).
A *Britiſh* ſubject cannot trade with an enemy without a licence - - 85
And ſuch licence muſt be ſtrictly obſerved - 87
Goods bought of the enemy cannot be inſured 86, 87
But this objection muſt be taken in the firſt inſtance - - 36, 89
Money cannot be legally lent on bottomry to an alien enemy - - - 741
In what caſe a neutral in partnerſhip with an alien enemy may inſure his intereſt - - 44
When the produce of the enemy's country ſhall be liable to capture in a neutral ſhip - - 502
Whether there ſhall be a return of premium upon an inſurance of enemy's property - - 645
Vide *Subject Matter* (*Commerce with the Enemy*)—*Return of Premium.*

EQUITABLE TITLE.
When an inſurable intereſt - - 115

EQUITY.
Vide *Court of Equity.*

EQUITY OF REDEMPTION.
To what purpoſe the perſon having the equity of redemption of a ſhip is conſidered as owner - 528

EVIDENCE.
When a foreign judgment ſhall be concluſive in our courts—Vide *Warranty* (*Neutral*).
Whether an uſage may be proved as explanatory of a clauſe in a policy - - 198
When the uſage of a ſimilar trade may be proved to ſhew the practice of a newly eſtabliſhed trade - 259
Vide *Uſage of Trade.*
When a declaration of the inſured, made abroad before a magiſtrate, may be read in evidence - 174
In what caſe a proteſt is evidence - - 715
When a ſubſequent underwriter may give in evidence a repreſentation made to the firſt - 772
The deciſion of a foreign court is the beſt evidence of the law of that country - - 762

EVIDENCE—*continued.* Page.
To prove the amount of ſalvage upon a recapture, the proceedings of the Court of Admiralty muſt be proved - - - 832
In general one underwriter cannot be a witneſs for another - - - - 704
But if the broker be alſo an underwriter, he may be a witneſs for the other underwriter - - ib.
A witneſs who never ſaw the ſhip, may prove that, from the deſcription of her by another witneſs, ſhe was not ſea-worthy - - - 832
Vide *Proceedings* (*Trial*).

EXPECTATION.
When an inſurable intereſt—Vide *Intereſt* (*Inſurable*).

EXPEDIENCE.
Ought not to be the ground of a judicial deciſion 33, 34

FACTOR.
When he ſhall have a *lien* upon a policy of his principal 151
When he may inſure in his own name - - 308

FIRE, Inſurance againſt.
Nature of this contract - - 784
Defined - - - ib.
But little in uſe in foreign countries - - ib.
Time of its introduction into *England* - - ib.
Whether more hurtful than beneficial to the public 785
Objections to it anſwered - - ib.
Companies for this ſpecies of inſurance - 786
To what duties ſubject - - ib.
Intereſt of the inſured - - 787
Whether ſuch inſurance be good without intereſt at common law - - ib.
Made void by ſtatute - - ib.
The inſured can only recover to the extent of his intereſt - - 788
Neceſſity of preventing ſuch inſurances without intereſt - - - ib.
In caſe of ſeveral inſurances, each office muſt have notice - - - ib.
What ſhall amount to a ſufficient intereſt - 789
Riſk - - 790
What riſk is uſually inſured againſt - - ib.

FIRE—*continued.* Page.

Riſk.

Exception of fires occaſioned by extraordinary cauſes 790
Meaning of the words "*uſurped power*" - ib.
"*civil commotion*" - 791
A Company which pays a loſs may ſue the hundred 794
Duration of the riſk for the 15 days after the time inſured - - - 796

Aſſignment of the policy - - 800
To one with intereſt - - ib.
How made upon a death - - ib.
By what authority made - - 801
Not effected by aſſignment of the goods inſured - 803
Muſt be by conſent of the office - - ib.
If the aſſigner of the goods engage to get the policy transferred, he is anſwerable if he omit to do ſo - 807
If the inſured gratuitouſly engage to get the policy transferred, and neglect it, he is liable - 298

Proof of the loſs - - 808
What are the uſual proofs - - - ib.
Neceſſity of theſe proofs - - 809
Nothing will excuſe the want of them - - ib.
The printed propoſals requiring them are a part of the contract - - 810
The procuring of this certificate is a condition precedent - - 811

FIRE (loſs by, at ſea).
Vide *Loſs* (*By fire*).

FISHING TACKLE.
Whether included in a policy on a *Greenland* whaler 727

FLEMINGS.
Commerce of - - 12
Ruined by *Philip* II. - - 14
Transferred to *England* and *Holland* - - ib.

FLORENCE.
Ordinance of - - - 20

FOREIGN JUDGMENT.
By comity concluſive evidence in our Courts - 391
Vide *Warranty* (*Neutral*).
This comity not univerſal - - ib.

The

FOREIGN JUDGMENT—*continued.* Page.
The *French* pay no regard to foreign judgments - 391
The conſequence of the rule not at firſt foreſeen - 393
Means, reſorted to for evading it - ib.

FOREIGN LAW.
How proved in our courts - - 762

FOREIGN SHIPS.
Reſtrictions of 19 Geo. II. c. 37. do not extend to them - - 129
But the clauſe againſt re-inſurance does extend to them - - 144
Vide *Intereſt* (*Wager,—Re-inſurance*).

FORT.
Whether the Governor of may inſure it againſt capture - - 91, 497
Vide *Intereſt.*

FOUNDERING AT SEA.
Vide *Loſs* (*By perils of the ſea*).

FRANCE.
Vide *Foreign Judgment*, Warranty (*Neutral*).

FRAUD.
Vide *Repreſentation,—Concealment.*
Is not to be preſumed - - 466

FREIGHT.
In *France* freight not already earned cannot be inſured 91
In *England* freight expected, as well as the ſhip, may be inſured - - 92
The inſured can only recover a loſs on freight, when the riſk has been commenced - - ib.
What ſhall amount to ſuch commencement - ib.
Where ſhip and freight are ſeparately inſured and ſeparately abandoned, to whom freight ſubſequently earned belongs 604, 606, 607
It can only be inſured by one who has a legal or equitable title to the ſhip - 115
Money may be lent on bottomry or freight - 746
Vide *Intereſt* (*Inſurable*).
The inſurer on goods is in no caſe liable for freight 728, 729

FREIGHT—*continued.* Page.
How a part owner may insure freight - 730
What shall be the duration of the risk on freight 278
What shall be the effect of an abandonment on freight.
Vide *Abandonment* (*Effect of*).

FRUIT.
When the insurer shall be liable for a damage to fruit 232

FURNITURE OF THE SHIP.
Vide *Tackle.*

GAMING.
Nature and effects of this vice - 119
Vide *Interest* (*Wager policies*).

GENERAL AVERAGE.
Vide *Average.*

GOODS.
What may be insured under this denomination - 319
Lashed to the deck, how insured - - ib.
Whether fishing tackle be goods - - 727

GOVERNOR.
Vide *Fort,—Interest.*

HANSEATIC LEAGUE.
Vide *Commerce,—Marine Law.*

HEALTH.
Warranty of - - - 769

HOPE.
When an insurable interest—Vid. *Interest* (*Insurable*).

HUSBAND, (ship's).
Vid. *Agent.*

HYPOTHECATION.
Vid. *Bottomry.*

JETTISON OR JETSON.
Vid. *Average.*

JEWELS.
How insured - - - 320
If clandestinely exported, the policy will be void - ib.

JOINT INSURANCE.
Vid. *Insurance Companies.*

JUDICIAL

JUDICIAL DECISIONS. Page.
Authority of - - - - 24
JUS POSTLIMINII.
With reſpect to captured ſhips, continues for ever - 573
INDIA COMPANY.
Vid. *Eaſt India Company.*
INDEMNITY.
What ſhall be deemed - - 617
INFANT.
Vid. *Lives*, (*Inſurance upon—Intereſt*).
INFECTION.
Whether the inſurer be liable to make good a loſs occaſioned by burning a ſhip to prevent infection - 494
INQUIRY, (Writ of).
What evidence ſufficient upon - - 129
Vid. *Proceedings.*
INSURANCE.
Defined - - - - - 1
Abuſes of, reſtrained - - - 2
Marine - - - - - ib.
Utility of - - - 3
Origin of - - - - 3
Cleirac's account of - - 4
Whether known to the ancients - - 5
Firſt practiſed in *Italy* - - - 10
When introduced into *England* - 11, 18
Not mentioned in the ancient ſea laws - 17
Law of, a branch of marine law - - 18
Materials from which this law is collected 18 to 24
Regulated by few poſitive laws in *England* - 21
Treatiſes on - - - - 22
Judicial deciſions - - - 24
When actions at common law were firſt brought on policies - - ib.
Ancient mode of ſettling diſputes upon - 25
Vid. *Court of policies of inſurance.*
Queſtions on ſhould not depend on ſubtleties 577
Ought not to be lucrative to the inſured - 617
INSURANCE BROKER.
Nature of his dealings - - - 291

Accounts

INSURANCE BROKER—*continued.* Page.
Account between him and each underwriter - 291
His liability for premiums extends only to legal inſurances - - - - - 292
Though the premium be due from him, the loſs is due to the inſured - - - - 293
He has a *lien* on the policy for his general balance 292, 301
Unleſs his employer acts as agent - - 301
If the underwriters give credit to him only for the premiums, he may recover them from the inſured - 294
If he employ another broker, he is anſwerable for not furniſhing him with all his inſtructions - 299
To what extent he is thus anſwerable - - ib.
He ought not to be an underwriter - - 301, 704
If he ſhould, he may nevertheleſs be a witneſs for the other underwriters - - - ib.
If he pretend that he has effected a policy, trover will lie againſt him for it - - - 302
How the plaintiff ſhall recover in ſuch action - 303
He may inſure in his own name without deſcribing himſelf as agent - - - 311
His duty as to repreſentations - - 451
He is reſponſible for any repreſentation he makes without authority - - - 452

INSURANCE COMPANIES.
Vid. *Parties to the contract* (*Inſurance Companies*).
Eſtabliſhment of the *Royal Exchange* and *London Aſſurance* companies - - - 45
Their charters - - - - 46
They have an excluſive right to inſure ſhips and goods upon a *joint capital* - - - ib.
How other companies are reſtrained from inſuring as ſuch - - - - 46, 47
But the right of individual inſurers remains unaltered - 47
And the privileges of the *Eaſt India* and *South Sea* companies are reſerved - - ib.
How the *Royal Exchange* and *London Aſſurance* companies may be diſſolved - - ib.
Whether the continuance of their monopoly be not injurious to the public - - - 48
One partner cannot recover from another his proportion of loſſes incurred upon joint inſurances - ib.

Nor

INSURANCE COMPANIES—*continued.* Page.
Nor can he recover, even from the broker, the ſhare of a loſs received by him from the other partner - 49
Nor can the oſtenſible underwriter recover the profits from the broker, on the ground that the partnerſhip being illegal, he was ſole inſurer - - 49
But the contract is binding as between the oſtenſible underwriter and the innocent inſured - - 51
An award that a balance is due from one partner to another upon joint inſurances is void - - ib.
In what caſe an inſurance upon a joint capital may be good - - - - - 52
How the common memorandum in their policies differs from that of private underwriters - - 224
Vid. *Riſk* (*Excluded by the memorandum*).
May make agreements for inſurances upon unſtamped labels - - - - 339
In what form of action they muſt be ſued - - 693
Vid. *Proceedings* (*Declaration*).
How they may plead - - 608
Vid. *Proceedings* (*Plea*).

INSURANCE AGAINST FIRE.
Vid. *Fire.*

INSURANCE UPON LIVES.
Vid. *Lives.*

INSURED.
What perſons may be - - 31
Whether an alien enemy - - ib.
Vid. *Enemy parties to the contract* (*Enemy*).
How he, his agent, or truſtee ſhall be named in the policy - - - 306

INSURERS.
What perſons may be - - 44
Individual underwriters - - - ib.
Character of the *French* underwriters - - 45
Engliſh - - - ib.
A borrower upon bottomry cannot be an inſurer upon the loan - - - 118
What they are preſumed to know - - 270
Vid. *Concealment.*

INTEREST. Page.

What ſhall amount to an inſurable intereſt - 104
Qualified property - - 105
In what caſe different perſons may each have an inſurable intereſt in the ſame thing to its full amount ib.
When the indorſee of a bill of lading has an inſurable intereſt - - - - ib.
When the indorſer ſtill retains an inſurable intereſt ib.
Where an expectation of profit, or of a future intereſt in a thing, is an inſurable intereſt - - 107
In what caſe a captor has an inſurable intereſt - 108
Truſtees for the care and diſpoſal of ſhips and goods, under the direction of third perſons have an inſurable intereſt - - - 109
Whether a truſtee, a conſignee, or a prize agent, has an inſurable intereſt - - - 111
A *lien* on the thing inſured is an inſurable intereſt 311
Whether an inſurance without intereſt be a legal contract at common law - - - 112
Where a mere *ceſtuique truſt* may inſure - - 114
Where a general agent may inſure in his own right 115
An inſurable intereſt can only be founded on a legal or equitable title - - - ib.
A joint purchaſer of a ſhip, whoſe name is not in the regiſter, has neither title - - - ib.
What title to freight will make an inſurable intereſt 116
The lender on bottomry has an inſurable intereſt in the ſum lent - - - - 117
And the borrower in the ſurplus value of the thing hypothecated - - - - 118
But the uſage of a particular trade may vary this rule - - - - ib.
The borrower cannot be an inſurer on the ſum lent ib.
When there ſhall be a return of premium for want of intereſt in the inſured, Vid. *Return of premium.*
How the intereſt of the inſured ſhall be proved—Vid. *Proceedings* (*Trial*).

Wager policies.
Miſchiefs reſulting from a ſpirit of gaming - 119
Legality of wagers conſidered - - 119
Difference between a wager and an inſurance - 121
Form of a wager policy - - - ib.

The

INTEREST—*continued.* Page.

Wager policies.

The words "intereſt or no intereſt" do not neceſſarily make a wager - - - 122
Prohibited in moſt countries - - - 122
Whether legal at common law in *England* - 122
At what time introduced here - - - ib.
Series of authorities on which its legality reſts 123, 126
How reſtrained by ſtatute - - - - 127
Exceptions as to privateers - - - - ib.
Alſo as to goods imported from the *Spaniſh* and *Portugueſe* colonies - - - 128
And as to foreign ſhips and goods - - 129
The inſured may be compelled to declare how much he has inſured, and borrowed on bottomry ib.
An inſurance on one thing, to depend on the fate of another, is a wager - - - 130
What the inſured in a wager policy takes upon himſelf to perform - - - 132
What ſhall be deemed a good policy in the *Liſbon* trade - - - - - ib.
A ſmall intereſt will not take the caſe out of the ſtatute - - - - - 133
An agreement in conſideration of a premium, to pay a certain ſum, if a ſhip do not arrive ſafe, is a wager - - - 134
How a valued policy is diſtinguiſhable from a wager ib.
Recovering beyond the true intereſt is againſt the ſtatute - - - - - 138
A valued policy upon expected profit has been holden not to be a wager - - - ib.
So upon expected commiſſion - - ib.
Whether there may be a wager in the form of a bottomry loan—Vid. *Bottomry.*

Re-inſurance - - - - 143
What - - - - 143, 145
To whom the re-inſurer is reſponſible - - 143
In what caſes legal - - - - ib.
The law reſtraining it extends to foreign ſhips - 144
Different ſorts of re-inſurance - - 144
Inſurance of the ſolvency of an inſurer - - 145

INTEREST—*continued.* Page.
Double insurance - - - 146
How it differs from re-insurance - - ib.
Though a wager, it is not void - - ib.
But the insured can only recover one satisfaction on the several policies - - ib.
Those who pay on one, may recover contribution from the underwriters on the others - 147, 148
Whether different persons may insure the same thing, and each recover the full value - - 149
Distinction between two insurances on different interests, and a double insurance - - 152
Whether a second insurer, with notice of the former insurance, be liable for the whole loss - - 151
The insured, if required, must declare how much he has insured in the whole - - - 152

"INTEREST OR NO INTEREST."
Vide *Interest (Wager)—Loss (By capture)*.

INTEREST (Proof of).
Vide *Proceedings (Trial)*.

INVOICE.
Vide *Documents*.

JUS POSTLIMINII.
In case of capture and recapture - 500, 501, 551

LANDING OF GOODS.
Vide *Shipping* and *landing of Goods*.

LAW OF MERCHANTS.
A branch of public law - - 18

LAW OF NATIONS.
Defined - - - 439
No individual state can vary it by its own ordinances 416
It is the rule for deciding questions of Prize - ib.
Alterations by treaty affect only the parties to such treaty - - - ib.

LEE (Lord C. J.).
Character of his decisions - - 29

LETTERS OF MARQUE.
Taken by a ship, insured as a private trader, will discharge the insurers - - 283

LETTERS OF MARQUE—*continued.* Page.
Otherwiſe, if taken merely to entice ſeamen to enter, and without any deſign to uſe them - - 285
Vide *Riſk* (*Changing*).
In what caſe a ſhip, having letters of marque, may cruize in queſt of prize - - 195
A liberty to cruize for 6 weeks means 6 ſucceſſive weeks - - - 197
The power given to ſhips having letters of marque muſt be ſtrictly purſued - - 198
If it be to "*chaſe, capture, and man prizes,*" it will not enable her to *convoy* a prize - - 199
Vide *Deviation.*

"LIBERTY TO CRUISE."
Vide *Letters of Marque—Riſk* (*Duration of*)—*Voyage* (*Deviation from*).

"LIBERTY TO TOUCH, STAY, AND TRADE."
How conſtrued - - 188, 191
A ſhip, having liberty to *touch*, may *trade*, without expreſs permiſſion, if it occaſion no delay, deviation, or additional riſk - - - - 835
Vide *Voyage* (*Deviation from*).
How, in the caſe of an *Eaſt India* voyage 272, 273
Vide *Riſk* (*Duration of*).

LIEN.
When it is an inſurable intereſt - - 311
Vide *Factor.*

LIGHTERS.
When the loſs of goods put into lighters ſhall be a general average - - 538
Vide *Loſs* (*By average.*).
When the riſk continues in lighters - - 254
Vide *Riſk* (*Duration of—On goods*).

LIVES (Inſurance upon). 766
Nature of this contract - - ib.
Defined - - - ib.
Companies for - - - - 767
Warranty of health and age of life - 769
Declaration of - - - ib.

How

LIVES (Insurance upon)—*continued.* Page.

Warranty of health and age of life.

How made - - - 769
A particular infirmity will not falsify it - ib.
Without it, the insurer takes all risks - - 772
Vide *Evidence.*

Interest of the insured - - 774
Without such interest the contract is void - ib.
In what case a creditor has an insurable interest in the life of his debtor - - 775
Whether this ought not to be where the payment depends on the life - - 776
If the debt be paid, even after the death, nothing can be recovered on the policy - - 777
It must be a legal debt - - 778
The insurer cannot object the infancy of the debtor ib.
A trustee may insure for his *cestui que trust* - 778

Risk which the insurer runs - 780
The loss must always be total - - ib.
What are the usual exceptions where the party insures his own life - - - ib.
To subject the insurers, not only the cause of the death, but the death itself, must happen within the time limited - - 780, 782
If the policy be *from* the day of the date, that day is excluded - - 781
Why there are so few litigated questions on this contract - - 666, 783
Remedy of the insured against the estate of a bankrupt insurer - - - 783
When there shall be a return of premium - 666
Vide *Return of Premium* (*Risk not commenced*).

LOG BOOK.
Vide *Documents.*

LOMBARDS (Commerce of). - . 10
Petition against - - - 12
Restrained - - - 13

LONDON ASSURANCE.
Vide *Insurance Companies.*

LOSS.
Total - - - 486

LOSS—*continued.* Page.
Partial - - - 487
to ſhip - - - - ib.
to goods - - - ib.
As to what ſhall be a total or a partial loſs, Vide *Abandonment.*
Average - - - ib.
Every loſs muſt be the immediate conſequence of ſome of the perils inſured againſt - 717, 719, 720
What loſſes are not within our policies - 218, 220
If a loſs be within the general words, the inſurer will be liable, unleſs he ſhew that it aroſe from a peril not meant to be inſured againſt - - 270
If the port of deſtination be ſhut, or in the enemy's hands, and the voyage loſt, it is not a loſs within the policy - - - 220
When there ſhall be a total loſs, though the goods ſpecifically remain - 227, 238
What ſhall be a loſs within the policy, Vide *Proceedings* (*Declaration*).
Within what time a loſs muſt happen to make the underwriters liable, Vide *Riſk* (*Duration of*).
A loſs improperly paid may be recovered back - 732
How a loſs ſhall be averred in the declaration—Vide *Proceedings* (*Declaration*).
How proved, Vide *Proceedings* (*Trial*).

By perils of the ſea - - 487
How theſe words are uſually underſtood - 416, 487
They comprehend every ſpecies of ſea damage 487
Foundering, ſtranding, ſtriking on ſunken rocks - ib.
What damage to the ſhip's tackle is a loſs within the policy - - - 420
[illegible] by perils of the ſea - - ib.
[illegible] ignorance, &c. of the maſter, &c. is not - ib.
[illegible]ndering - - - 483
When a miſſing ſhip ſhall be preſumed to have foundered - - - 488
If the damage can be repaired, it is only a partial loſs ib.
When a ſhip ſhall be deemed a miſſing ſhip - ib.
What ſhall be a loſs by capture, and not by perils of the ſea - - - 490

If

LOSS—*continued.* Page.

By perils of the sea.

If part of a ship's crew be impressed at a critical moment, and in consequence the ship drive on shore, this is a loss by the perils of the sea - 490

If slaves be thrown overboard on account of a scarcity of water, occasioned by an unusual length of the voyage, this is not a loss by the perils of the sea 491

So, if they die from want of food, arising from the same cause - - - - ib.

If a ship be destroyed by worms, it is not a loss by the perils of the sea - - - 492

Nor if she be damaged by the ordinary service in which she is engaged - - - ib.

By collision - - - 493

Is a loss within the policy - - - ib.

The party suffering by collision, or the insurers in his name, have a remedy against the master or owners of the vessel in fault - - 493

By fire - - - - 494

If this be by accident, it is within the policy - 494

Whether, if imputable to the master or mariners, it be within the policy - - - ib.

Whether if it be by order of the State, to prevent infection, it be within the policy - - ib.

By capture - - - - 495

What shall be deemed a capture - - 495, 719

Whether an action will lie for a loss by *British* capture - - 40, 41, 830

Vide *Parties to the contract.*

A seizure by an enemy for *smuggling*, is not a capture *jure belli* - - - 689

Whether lawful or unlawful, the insurer is liable - 495

And whether the property be thereby changed ib.

The effect of capture where the policy is "*interest or no interest*" - - - 496-7-8-9

The effect of capture and recapture in divesting and revesting the property - - - 499

The insurers are liable for all salvage charges occasioned by capture and recapture - - 501

LOSS—*continued.* Page.

By capture.

As money paid to the captors upon a compromiſe - 502
In what caſe the produce of an enemy's country ſhall be liable to capture - - - ib.
Whether captured ſhips may be ranſomed - 503
When a recaptured ſhip may proſecute her voyage . 505
Within what time the recaptors ſhall proceed to judgment in ſuch caſe - - - ib.
Capture does not neceſſarily make a total loſs, nor recapture prevent it - - 565, 579
If the captain purchaſe from the captors, the ſum paid is a partial loſs - - 580, 581
Vide *Abandonment* (*Upon capture*)—*Enemy* — *Loſs* (*By ſalvage.*)

By detention of princes - - - 506
Arreſt of princes, what - - - ib.
Diſtinction between arreſt and capture - - ib.
If government ſeize a corn ſhip in a famine, this is an arreſt - - - 507
But if done by a mob of rioters it is a capture by pirates - - - - 508
The word *people* in the policy means a people, not a mob - - - - - ib.
If a neutral be taken at ſea, under pretence that ſhe is an enemy, this is a capture - - 507
But if ſeized for a breach of the law of nations, it is an *arreſt* - - - - ib.
Not ſo, if ſhe be ſeized for navigating contrary to law 508
An embargo is always an arreſt within the policy - ib.
An arreſt by the authority of the *Britiſh* government is a loſs within the policy - - 509, 830
A ſuſpenſion of the power of diſpoſal is a total loſs - 510
If a ſhip inſured "*at and from*" a port be arreſted *in* the port, it is a loſs within the policy - ib.
If a ſhip be ſeized after a ceſſation of hoſtilities, it is an arreſt - - - - 514
If a neutral ſhip bound to an enemy's port, be ſeized for having enemy's goods on board, and while under detention, her port of deſtination be blockaded, and the voyage loſt, this is a loſs upon her *neutral cargo* - - - 836

LOSS—*continued.* Page.

By barratry - - - 515

Barratry defined - - - ib.

In what caſe inſurance againſt barratry ought to be permitted - - - - ib.

What ſhall amount to barratry - 516-17-18

Even dropping anchor with a fraudulent view is barratry - - - - 532

Whether the captain may be inſured againſt the barratry of the failors - - - 518

When a deviation ſhall not be barratry - - ib.

Whether the ſailors may commit barratry againſt the will of the captain - - - 520

When their diſobedience amounts to barratry - ib.

When cruizing in queſt of prize is barratry - ib.

What act of the captain amounts to barratry - 522

It can only be committed againſt the owners - 524

It cannot be committed by the captain, if he be owner - - - - 528

Or even if he have the equity of redemption - ib.

A general freighter is owner for the voyage - ib.

A deviation without his knowledge, though with the conſent of the *owner*, is barratry - - ib.

In proving barratry, it is not neceſſary to prove *negatively*, that the maſter was not owner, or that it was not done with the owner's conſent - 531

The words "*in any lawful trade*" will not exempt the inſurers from barratry *by ſmuggling* - 532

It is immaterial whether the loſs happen during the act of barratry, or after - - - 533

But the inſurers will not be liable if the loſs, occaſioned by barratry, do not happen during the voyage - - - - ib.

How a loſs by barratry ſhall be averred in the declaration, Vide *Proceedings* (*Declaration*).

How it ſhall be proved, Vide *Proceedings* (*Proof of loſs*).

By average contributions.

Average defined - - - 535

Different ſorts - - - - ib.

General - - - 536, 542

Particular - - - - 536

Petty - - - - ib.

LOSS—*continued.* Page.

By average contributions.

General average is a charge againſt the inſurer, when the ſhip or goods inſured are ſaved by it - - 537
When average contributions may be claimed - 535, 537
When petty average ſhall be a charge on the inſurer - 536
When the loſs of goods put into lighters to lighten the ſhip ſhall be a general average - - - ib.
When wages incurred during a repair ſhall be a general average - 538, 721, 726
In the caſe of unlawful detention where the ſhip puts into port to repair - 538, 539, 541
Damage by wear and tear or ſtreſs of weather, is not a general average - - - 540
Whether an injury ſuſtained in an endeavour to eſcape an enemy be a general average - 543
How goods ſhall be valued in ſettling an average - 621
What ſhall be only a *particular average* - - 542
What ſhall be liable to contribute to a general average - - - - - 543
Captain's duty in ſettling a general average - 544
Remedy againſt him for neglecting this - - ib.
How the contribution ſhall be adjuſted - - 545
In what degree the ſhip and freight are liable - ib.
How a jettiſon ſhall be valued - - ib.
How the underwriters ſhall reimburſe average contributions - - - 546
Whether the lender on bottomry be liable to general average, Vide *Bottomry.*
What ſhall be an average loſs within the common memorandum, Vide *Riſks* (*Memorandum*).

By ſalvage - - - 547
Salvage defined - - - - ib.
The *lien* for it at common law - - - ib.
How regulated - - - 548
How ſecured - - - - ib.
How adjuſted when the parties diſagree - - ib.
How the effects ſaved ſhall be diſpoſed of - 549
Reward of perſons *not employed* - - ib.
Who may employ perſons in the ſalvage of ſhips, &c. 550
By whom the quantum of ſalvage ſhall be adjuſted - ib.
How it ſhall be levied on the effects ſaved - - ib.

How

LOSS—*continued.* Page.

By ſalvage.

How regulated upon a recapture by the marine law - - - - 551
How by ſtatute - - - ib.
Where recaptured by men of war - - ib.
by privateers - - - ib.
by both jointly - - 552
If a captured ſhip be ſet forth as a *ſhip of war*, ſhe ſhall be prize - - - - ib.
The inſured need not declare ſpecially for ſalvage 552,720
What ſhall be ſufficient evidence of loſs by ſalvage upon a recapture - - - 832
Vide *Proceedings* (*Proof of loſs.*)
How ſalvage is regulated in the caſe of recaptured neutrals - - - - - 552
How in the caſe of recaptured allies - - 553
How the inſured muſt ſhew his title to recover for ſalvage - - - - - ib.
If the ſalvage be very high the inſured may abandon ib.
Whether a lender on bottomry be entitled to the benent of ſalvage, Vide *Bottomry*.

By the death of ſlaves - - - 554
Slaves formerly inſured as goods - - 93
How this trade was regulated - - ib.
Now totally aboliſhed in the *Britiſh* empire - ib.
Whether natural death be a legal riſk - - ib.
Whether ſlaves thrown overboard in a ſcarcity of water, or who periſh for want of food, be a loſs within the policy - - - ib.
What ſhall be a mortality by mutiny - - 555

By the death of animals - - - ib.
This, if occaſioned by any of the perils inſured againſt, is a loſs within the policy - - ib.
Not ſo, if they die of diſeaſe - - ib.

Fraudulent loſſes - - - - 556
Puniſhment of piracy - - - ib.
Puniſhment of the wilful deſtruction of ſhips to the prejudice of the owners - - - 557
Puniſhment of wiltully caſting away any ſhip to the prejudice of the underwriters or owners of the goods - - - - - 550

"LOST OR NOT LOST." Page.
These words are not peculiar to *Engliſh* policies - 332
Reaſons for inſerting them - - - ib.
Do not make the contract a wager - - 333
Nor more hazardous - - - - ib.

LOUIS XIV.
Account of his famous ordinance of the marine - 18

MAGENS
His project for a ſyſtem of marine law - - 21

MANSFIELD, (Lord).
Celebrity of his judgements in inſurance cauſes - 29

MARINE INTEREST.
Vide *Bottomry*.

MARINE LAW.
Hiſtory of - - - - - 14
Rhodian law - - - - 15
Amalphitan code - - - - ib.
Conſolato del mare - - - - 16
Laws of *Oleron* - - - - ib.
Laws of *Wiſbuy* - - - - 17
Ordinances of the *Hanſiatic League* - - 18
Ordinance of the marine of *Louis* XIV. - - ib.
Law of inſurance - - - - ib.
Law of merchants - - - - 19
Particular uſages of trade - - - ib.

MARINERS.
Vide *Sailors*.

MARINERS COMPASS.
Diſcovery of - - - - - 9

MARKET.
The inſurer ought not to be involved in the riſe or fall of - - - - - 628
Vide *Adjuſtment*.

MASTER (of a ſhip)
Vide *Captain*.

MEMORANDUM (uſual)
What riſks are excluded by, Vide *Riſks (Memorandum)*.

MERCHANTS (law of) Page.
A branch of public law - 18

MISREPRESENTATION.
Vide *Repreſentation.*

MISSING SHIP.
When preſumed to be loſt - - 488
Vide *Loſs (By perils of the ſea).*

MISTAKE (of the captain).
Whether a riſk within the policy - 487

MONEY.
How inſured - - - - 319
Cannot be legally inſured, if clandeſtinely tranſported 320
When it ſhall contribute to a general average - 543

MONEY HAD AND RECEIVED.
When a count upon, is neceſſary in the declaration,
Vide *Proceedings (Declaration).*
Will lie to recover back a loſs improperly paid - 732
Or to recover back the premium - - 694

MONOPOLIES.
Effect of - - - - 13
Aboliſhed - - - - ib.

MOORED (in ſafety.)
When a ſhip ſhall be ſaid to be - - - 262
Vide *Riſk (Duration of—On ſhip).*

MORTGAGE (of a ſhip.)
In what caſe the mortgagor ſhall be deemed owner 528
When a mortgage ſhall be ſufficient proof of intereſt 711

MUSTER ROLL.
Vide *Documents*

MUTINY.
When an excuſe for deviation - - - 212
Of ſlaves, what ſhall be a loſs by - - 555
Vide *Abandonment—Voyage (Deviation from).*

NAUTICUM FOENUS.
Vide *Bottomry.*

NAVIGATION LAWS (*Britiſh.*) Page.
Summary of - - - - - 62
Extended to *Scotland* and *Ireland* - - 63
Vide *Subject matter* (*Prohibited colonial trade*).

NECESSITY (voyage of)
Vide *Voyage* (*Deviation from*).

NEGRO SLAVES.
Vide *Slaves*,—*Riſk*,—*Loſs* (*By death of ſlaves*).

NEUTRAL.
In what caſe a neutral, though partner with an alien enemy, may inſure - - - - 44
Neutral property may be inſured againſt *Britiſh* capture, provided the inſurance contravene no policy of the ſtate - - - - 830
Vide *Enemy*,—*Parties to the contract*.
Obligations of neutrality - - - 78
The right of viſitation and ſearch of neutrals vindicated - - - - 81, 115
Who ſhall be deemed neutral - - 316
In what caſes the produce of the enemy's country may be captured in a neutral veſſel - - 502
If a neutral be brought into port, having enemy's property on board, and while detained there, her port of deſtination be blockaded, this is a loſs of the voyage, for which the underwriters on neutral goods are liable - - - - 835
Warranty of neutrality - - - 384
Vide *Warranty* (*Neutral*).

NEW TRIAL.
Is not granted to let in the objection of alien enemy 36, 84, 85, 89
Is granted with more facility in queſtions of inſurance than in other caſes - - - 702

NORTHERN CONFEDERACY.
Account of its inſtitution - - - 442

OLERON (Laws of.)
Vide *Marine Law*.

OPEN POLICY.
Vide *Policy*.

OPINION. Page.
Vide *Evidence.*

ORDINANCES.
Vide *Marine Law,—Inſurance.*

OVER INSURANCE.
Vide *Intereſt* (*Double inſurance*)—*Return of premium.*

OWNERS.
To what riſks liable, Vide *Riſk* (*Owners liable*).

PAPERS (ſhips').
Vide *Documents.*

PAROL AGREEMENT.
When it will control the written policy - - 345

PARTIAL LOSS.
Vide *Loſs,—Abandonment.*

PARTIES TO THE CONTRACT.
What perſons may be inſured - 31
Whether an alien enemy - - - ib.
Occaſionally prohibited by ſtatute - - ib.
Whether at common law ſuch inſurance be valid 32
Opinions of foreign writers - - - ib.
Reaſons of policy againſt it - - 33, 37
Lord *Mansfield*'s ſentiments - - - 34
Whether the law ought to yield to expediance 34, 35
Whether an action will lie for a loſs by *Britiſh* capture - - - - 40, 41
A neutral may recover for a loſs by *Britiſh* capture, provided the inſurance contravene no policy of the ſtate - - - - - 830
An enemy cannot recover on a policy on goods, though ſhipped before the war, and the action brought after the peace - - - 40
And though the goods were of *Britiſh* manufacture - - - - 38, 39
Nor can an agent, though a creditor, maintain an action for him - - - - 38
Whether an action would, in ſuch caſe, lie for any other loſs - - - - 40

PARTIES TO THE CONTRACT—*continued.* Page.
What perſons may be inſured.
The ſame rule holds in the caſe of capture from a co-belligerent - - - - 43
Whether *Britiſh* property may be inſured againſt *Britiſh* capture. - - - - ib.
Whether a neutral reſiding in the enemy's country may be inſured - - - 44
Vide *Enemy*.
What perſons may be inſurers - - - 44
Underwriters - - - ib.
Character of the *French* underwriters - - 45
Engliſh underwriters - - ib.
Vide *Underwriters*.
The two inſurance companies - - ib.
Vide *Inſurance Companies*.

PARTNERS (inſurance by.)
Vide *Inſurance Companies*.

PASSPORT.
Vide *Documents*.

PEAS.
Are comprehended under the word *corn* - - 223

PECUNIA TRAJECTITIA.
Vide *Bottomry*.

PEOPLE.
Meaning of this word in the policy - 230, 508, 689
Vide *Riſk,—Loſs (By arreſt of princes)*.

PERILS.
Vide *Riſks,—Loſs*

PETTY AVERAGE.
Vide *Average*.

PIRACY.
How puniſhed - - - - 556

POLICY.
Nature and different ſorts of - - 286
Valued - - - - ib.
Open - - - - ib.
How the value ought to be regulated - 288
Effect of the valuation - - - ib.

How

POLICY—*continued.* Page.

Nature and different ſorts of.

How a valued policy differs from a wager 135, 289
How the value is regulated by the *French* laws 290
How by the *Engliſh* law - - 134, 291
Effect of the valuation before and after wager policies were held legal - - 135, 136
Whether the inſured upon a valued policy ought to recover more than the true value - - 138
A valued policy on commiſſion or profit is good ib.
Upon a valued policy, the underwriters ſhall be liable as for a total loſs, though previous to the loſs, part of the goods valued be diſpoſed of 139
Yet the value is only *prima facie* evidence of the intereſt - - - - 289
The principal difference between an open and a valued policy, is in the caſe of a total loſs 291

How and by whom effected - - ib.
Uſually by an inſurance broker - - ib.
Vide *Inſurance Broker.*
When effected the inſured may maintain trover for it - - - - - 301
If an agent *pretend* he has effected it, trover will lie for it - - - - - 302
Vide *Agent.*

Form and requiſites of - - 303
When the preſent form was introduced - ib.
How interpreted - - - 250, 304, 5
A witneſs may give evidence of an uſage explanatory of a clauſe, but not his opinion of its meaning 198
Occaſional clauſes - 305
Its requiſites are,
1. *The name of the inſured* - - - ib.
In whoſe name it may be - - ib.
Policies in blank prohibited - - ib.
Who ſhall be an agent to inſure - 308
A general agent may inſure without order 310
When the name of the broker is ſufficient 311
An agent, though not general, may inſure 312
2. *The names of the ſhip and maſter* - - ib.
When the ſhip ſpecified may be changed,
Vide *Ship (Changing).*

POLICY—*continued.* Page.

Requiſites.

The names of the ſhip and maſter.

No goods are within the policy, but thoſe on board the ſhip named - - 313

But a miſtake in the name will not vitiate, if the identity be proved - - - ib.

When an inſurance may be on board "*ſhip or ſhips*" - - - - 314

Vide *Ship.*

The ſpecies of veſſel muſt be mentioned - ib.

If the veſſel be a letter of marque or privateer, ſhe muſt be ſo deſcribed - - 315

The maſter's name muſt be mentioned ib.

When he may be changed - - ib.

3. *The ſubject matter* - - - ib.

It may be on goods generally, or the goods may be ſpecified - - - 316

What ſhall be comprehended under a general policy on goods - - - 319

What not - - - - 320

What is comprehended in the word *ſhip* ib.

Bottomry loans muſt be deſcribed as ſuch 317

Unleſs the uſage of a particular trade ſhould make an exception - - 319

4. *The deſcription of the voyage* - - 321

Has a direct reference to all the circumſtances attending it - - - 270

If a blank be left for the port of departure, or of deſtination, the policy will be void - 321

How the commencement and end of the riſk ſhall be ſpecified - - - ib

If for a term, it muſt not exceed 12 months 322

It muſt not be calculated to induce a falſe concluſion - - - - ib.

A policy on goods from the loading at A. will not protect goods loaded at B. though they come to A before the ſhip ſails on her voyage 323

A policy from ſeveral places of departure will not cover a voyage from one to another of them - - - - - ib.

The port or ports of deſtination muſt be truly ſtated - - - - ib.

If

POLICY—*continued.* Page.

Requiſites.

Deſcription of the voyage.

If the ſhip ſail on a different voyage from that mentioned, the underwriters will be diſcharged - - - 324, 326

Diſtinction between an intended deviation and a different voyage - - - 327

Vide *Voyage* (*Deviation from.*)

If the ſhip be to take a particular courſe, it muſt be ſpecified - - - ib.

5. *The perils inſured againſt* - - 332

What perils are not within the general words ib.

Of the clauſe "loſt or not loſt" - - ib.

This does not make the policy a wager 333

Nor the contract more hazardous - - ib.

6. *The powers of the inſured in caſe of misfortune* 334

Meaning of this clauſe - - - 591

7. *Promiſe of the inſurers and receipt for the premium* 334

Why the receipt is part of the policy - ib.

An action will lie for the premium notwithſtanding the receipt - - - 335

The non-payment will not affect the contract ib.

8. *The common memorandum* - - 336

9. *The date and ſubſcription* - - - ib.

How the ſubſcriptions are made - - 337

10. *The ſtamp* - - - - ib.

To what duties marine inſurances are liable 337, 340

In certain caſes the exceſs of duty, upon an over-inſurance, is allowed - - 338

What contract ſhall be deemed a policy liable to theſe duties - - - ib.

No policy on a ſhip to be for a term exceeding 12 months - - - - ib.

When a policy may be altered without a new ſtamp - - - - 339

No policy to be ſtamped after written or printed - - - - ib.

Penalties for effecting, or contracting for, any inſurance, unleſs ſtamped - - ib.

Penalties on the broker for negotiating ſuch inſurance - - - ib.

POLICY.—*continued.* Page.

Requiſites.

In what caſe the two inſurance companies may contract on unſtamped labels - - 339
A ſlip of paper to prove who was the firſt underwriter, to whom a repreſentation was made, muſt be ſtamped - - 341, 455
But this objection ſhould be made in the firſt inſtance - - - - 455
A memorandum extending the time of ſailing requires no new ſtamp - - - ib.
But a policy on a "ſhip and *outfit*," cannot be altered to "ſhip and *goods*," without a new ſtamp - - - 342
But a policy will cover ſucceſſive cargoes without a new ſtamp - - - ib.

When a policy may be altered or corrected 343
What will authorize an alteration - - ib.
In what caſe the court will order it - - ib.
In what caſe it may be done after a loſs - ib.
When a court of equity will direct an alteration 344
When it may be in purſuance of an agreement ib.
When a parol agreement ſhall control the words 345

POLICY BROKER.
Vide *Inſurance Broker.*

PORT OF DISCHARGE.
Where there are ſeveral, in what order to be taken 325
Vide *Voyage* (*Deviation from.*)

PREMIUM.
Why the receipt for it is part of the policy - 334
An action will lie for it notwithſtanding this receipt 335
The non-payment of it does not affect the contract ib.
Vide *Policy* (*Premium*)—*Return of Premium*,—*Inſurance Broker.*

PRESUMPTION.
Upon what ground a legitimate preſumption may be founded - - - 426. 427
When a ſhip ſhall be preſumed to be loſt - - 488

PRIVATEER.
May be inſured, "intereſt or no intereſt" - - 127
To what ſalvage entitled upon a recapture - 552

PRIZE.

PRIZE. Page.
When insurable by the captors, Vide *Interest* (*Insurable*) —*Warranty* (*Neutral.*)

PRIZE AGENT.
When he shall have an insurable interest, Vide *Interest* (*Insurable.*)

PROCEEDINGS.
When actions at common law were first brought on policies - - - - - - 24
Ancient mode of settling disputes - - 25
History of the court of policies of insurance - ib.

In what courts actions on policies may be brought - - 678
Courts of common law - - - ib.
Courts of equity have no jurisdiction - - 679

The Declaration - - - 680
What is the proper form of action - - ib.
Against private underwriters - - ib.
Against the two insurance companies - - 693
Form of declaring against them - - ib.
Heads of a declaration - - - 680
Count for money had and received - 681, 694
No occasion to declare specially upon an adjustment. Vide *Adjustment.*
How the interest shall be averred - - 687, 792
How in the case of a foreign ship - - 694
One of several insureds may aver interest in himself alone - - - - 712
When the venue may be changed - - 694

Plea, and bringing money into court. ib.
When the general issue is the proper plea - ib.
Instance of a special traverse - - 695 n.
What may be given in evidence under the general issue - - - - ib.
In what case the insured must declare how much he has insured - - - 696
When the defendant may plead a tender - ib.
When bring money into court - - ib.
On what count - - - - ib.

PROCEEDINGS—*continued.* Page.

Plea and bringing money into court.

Whether alien enemy ought to be ſpecially pleaded 697
How the two inſurance companies muſt plead 699

Conſolidation Rule. - - ib.

Neceſſity of conſolidating actions - - ib.
Formerly done by authority of courts of equity - ib.
Firſt attempt to conſolidate in a court of law - ib.
Nature of the rule - - - 701
Neceſſity of mutual admiſſions - - ib.
Terms impoſed on each party - - ib.
Benefits reſulting from the rule - - ib.
Effect of conſolidating - - - 702
When the ſuing out of a writ of error is a breach of the rule - - - - ib.

Trial - - - - 703

Proofs on the part of the plaintiff - - ib.
An underwriter cannot be a witneſs - 704
Unleſs he be the broker who effected the policy ib.
The captain who is a part owner may prove that the place in the policy was the true deſtination 705
But not that a deviation was juſtified by neceſſity ib.
The proofs on the part of the plaintiff are,
1. *The contract* - - - - 706
No parol evidence can be received to prove an agreement inconſiſtent with the policy - ib.
Whether an uſage explanatory of a clauſe may be proved - - - - 707
How far the uſage of trade ought to prevail ib.
What ſhall be ſufficient proof of the authority of an agent to underwrite for his principal ib.
2. *Payment of the premium* - - 708
3. *Intereſt of the inſured* - - 709
How this ſhall be proved - - ib.
Upon a valued policy - - 710
Upon a policy on goods - - ib. 711
Bottomry loans - - ib.
How a bottomry bond ſhall be proved - ib.
Proof of poſſeſſion is *prima facie* evidence of title to a ſhip - - - 711
So the appointment of captain - - 712
But the regiſter is concluſive - - ib.

PROCEEDINGS—*continued.* Page.

Trial.

Proofs on the part of the plaintiff.

Intereſt of the inſured.

One of ſeveral inſured's may aver and prove intereſt in himſelf alone - - 712
What ſhall be proof of title to a prize ſhip ib.
Whether upon a writ of enquiry the plaintiff muſt prove it - - - 129
4. *Compliance with warranties* - - - 713
What ſhall be ſufficient proof of neutral property - - - 714
5. *The loſs* - - - - ib.
This muſt be ſhewn to have happened during the riſk inſured - - - ib.
One part owner may prove his loſs upon a general policy on freight - - 730
Upon a ſhip - - - - 715
Upon goods - - - ib.
By capture - - 716, 717
By detention of princes - - - 716
By barratry - - - - 717
What loſs may be proved on a policy on ſlaves ib.
When payment of ſalvage is evidence - 720
To prove the amount of ſalvage paid upon a recapture, the proceedings of the Court of Admiralty muſt be proved 832
By fire - - - 720
The loſs proved muſt be an immediate conſequence of the cauſe alledged - 717, 720
In what caſe wages and proviſions ſhall be a loſs within the policy - 721
What ſhall be evidence of loſs on a policy on the ſhip - - -
An inſurer on goods is not liable for freight 728, 729
How the plaintiff ſhall recover - - 729
If he declare for a total loſs, he may recover as for a partial loſs - - ib.
So he may recover as part-owner of an entire thing - - - ib.
What remedy the inſured ſhall have againſt the eſtate of a bankrupt underwriter - 731
6. *When a loſs improperly paid may be recovered back* 732

PROCURATION. Page.
Vide *Agent,—Proceedings, (Trial)*.

PROFIT.
Inſurance of diſcuſſed - 94
Vide *Subject matter (Profit)*.

PROHIBITED GOODS.
Vide *Smuggling*.

PROTEST.
Vide *Evidence*.

PROVISIONS (ſhip's)
How protected by the policy - - 721, 723
In what caſe the conſumption of is a loſs within the policy - - - 721, 726
Vide *Proceedings (Proof of loſs)*.

QUALIFIED PROPERTY.
When an inſurable intereſt - - 105

QUARANTINE.
When the riſk on a ſhip ſhall continue during quarantine - - - - - - 264

RANSOM.
How the law now ſtands reſpecting the ranſoming of ſhips - - - 503
When the purchaſe of a captured ſhip ſhall be deemed a ranſom - - - - 515

RATS.
When the owners and maſter are liable for injuries by 242

REGISTER (ſhip's).
A purchaſer has no title to a ſhip, either at law or in equity, unleſs he be in the regiſter - - 115

RE-INSURANCE.
Vide *Intereſt (Re-inſurance)*.

RENDEZVOUS.
Vide *Warranty (Convoy)*.

REPAIRS.
Vide *Average,—Proceedings, (Proof of loſs)*.

REPRESENTATION. Page.
What ſhall be material, and how and when made - - - 450
Defined - - - - ib.
Different kinds - - - ib.
When material - - - ib.
Difference between a repreſentation and a warranty 451
Written inſtructions, unleſs inſerted in the policy, are only repreſentations - - ib.
Duty of agents and brokers as to the repreſentations made by them - - - ib.
Their reſponſibility for any repreſentation made without authority - - - 452
At what time to be made - - - ib.
If made when the ſlip is preſented for ſubſcriptions, it will not affect the contract - - - ib.
A material miſrepreſentation, whether by the inſured or his agent, and whether fraudulent or innocent, will avoid the contract - 453, 456-7.
Though the perſon making it know not whether it be true or falſe - - - - ib.
Or believe it to be true - - - ib.
Otherwiſe, if he ſtate it only as *belief* - - 454
Or as matter of *expectation* - - - ib.
But if he ſtate his computation as *fact*, and it prove untrue, it will be fatal - - - 456
How far the repreſentation to the firſt underwriter is a repreſentation to all - 454, 772
When deemed ſufficiently true - - 458
It is ſufficient if it be true in ſubſtance - - ib.
If the riſk be repreſented as leſs than that which is deſcribed in the policy, it will not affect the contract - - - - - 459
A repreſentation, though untrue, will not avoid the contract, if the inſurer be not deceived by it 461
But if it be ſtated that a ſhip was *ready to ſail*, when in fact ſhe *had ſailed*, this is fatal - - 463
Vide *Concealment*.

RESPONDENTIA.
Vide *Bottomry*.

RESTITUTION.
Vide *Loſs* (*By capture—By ſalvage*).

RETURN OF PREMIUM. Page.
Upon what principle this is founded - - 638

When the contract is void - - - 639
1. *For want of interest* - - - ib.
Upon an over-insurance - - ib. 640.
But there shall be no return upon a wager - 640
Unless the contract be rescinded while it is executory - - - 641
There shall be no return upon a re-insurance - 643
The principle upon which the premium shall be retained upon a void policy - - 643, 4
2. *The insurance being illegal* - - 645
Though the insurance upon a trading with the enemy be void, there shall be no return - 647
And though the insured be a foreigner and ignorant of our laws - - - ib.
3. *For fraud on the one side or the other* - 648
If the policy be void for fraud on the part of the insurer, the premium shall be returned - ib.
But otherwise, if it be void without fraud - 654
Formerly there was a return of premium if the contract was void, even for fraud on the part of the insured - - - 650
But the contrary is now settled law - - 652

Where the risk has not been commenced - 652
Whether this may be, when it proceeds from the act of the insured - - ib. 653
And where the risk is not begun - - 654
When the voyage is divisible and part not begun 655, 657
Upon an insurance "at and from" - - 658
In what case usage will warrant an apportionment of the premium - - - 659, 660
Where a contingency will divide the risk - - 660
Where the risk is entire - - - 661
Where the premium is entire - - 663
Where the insurance is for a term - - 664
Where it is upon a life - - - 666
Where the premium is computed at so much per month - - - - 668

Upon

RETURN OF PREMIUM—*continued.* Page.
Upon the performance of ſome ſtipulation - 669
Upon the ſhip's ſailing with convoy and arriving ib. 672
Reaſon of this ſtipulation - - 670
Meaning of the word "*arrives*"? - - 671
What arrival will entitle the inſured to a return 673, 4
What ſhall be a ſailing with convoy within the ſtipulation, Vide *Warranty* (*Convoy*).
If the underwriters be diſcharged before the ſhip can ſail with convoy, there ſhall be a return - 676
Deduction upon the return - - 676
Upon what ground this deduction is allowed - ib.
When the inſured ſhall have a verdict for the premium though there be a verdict againſt him upon the merits - - - - 654

REVERSIONER.
How a fire policy ſhall be aſſigned to him - - 809

RHODIANS.
Their marine laws, Vide *Marine Law.*

RICE.
Not comprehended under the word *corn* in the uſual memorandum - - - - - 831

RIGGING.
Vide *Tackle.*

RIOTS.
Whether the riots of 1780 were a *civil commotion* within the exception of a fire policy - - 791

RISKS.
Againſt what riſks marine inſurances may be legally made - - - 215
Not againſt the fault of the inſured - - ib.
Whether againſt the miſtake of the captain - 487
Not againſt any riſk upon illegal commerce - 215
Whether the lives of men may be inſured - - ib.
In the caſe of *Negro Slaves* - - ib.
Vide *Slaves.*

RISKS—*continued.* Page.

What are within the common policy - - 217
Effect of the words which ſpecify the riſks - 218
Shutting the port of delivery is not a riſk within the policy - - - - ib.
Nor its being in the hands of the enemy - - 220

What are excluded by the uſual memorandum 221, 231
Purport of it - - - - 221
It controuls the general words of the policy - 228
When introduced into policies - - - 222
For what purpoſe - - - ib.
Form of it - - - - 223
The word *corn* comprehends *peas* and *beans* - ib.
But not *rice* - - - - 831
Conſtruction of the clauſe, "*Free of average, unleſs general, or the ſhip be ſtranded*" - - 224
The two inſurance companies omit the words, "*or the ſhip be ſtranded*" - - - ib.
Held that they make a *condition* - - - ib.
Held that they make an *exception* - - ib.
Whether the underwriters be liable for a loſs upon the enumerated articles though they ſpecifically remain - - - 227, 238
Whether upon a ſtranding they are put into the ſame ſituation as other commodities - - 228
What ſhall be a loſs by ſtranding within the memorandum - - - - 230
In what caſe the inſurers ſhall be liable for a partial loſs upon the enumerated articles - - 231
It is now ſettled that the clauſe, "*or the ſhip be ſtranded*" is a condition, and a ſtranding lets in all partial loſſes - - - - 233
Whether the memorandum excludes the total loſs of an entire individual - - - 239
If the ſhip be ſtranded it deſtroys the exception, and lets in the general words - - - 235
Meaning of the word *ſtranding* - - - 239
Running aground in the river by being run foul of, is not a ſtranding - - - 240

RISKS—*continued.* Page.

To what riſks the owners and maſter of the ſhip are liable - - - 241
Damage occaſioned by the fault of the ſhip - ib.
Bad ſtowage, wet, theft, embezzlement, rats, &c. 242
Difference between the reſponſibility of carriers by land and by ſea - - - 243
The latter are anſwerable for theft, though all precautions be taken - - - - 242
Whether they are anſwerable for accidents in ſhipping and landing goods - - - 244
To what extent they are liable - - ib.
At common law - - - ib.
By ſtatute - - - - ib.
But the inſurers as well as the owners and maſter are liable for external theft - - - 246
Remedy of the inſurers againſt the owners and maſter - - - - ib.

Duration of - - - - 246
1. *Upon goods* - - - - 247
On board the ſame ſhip - - - 249
Removed to another ſhip - - - ib.
On board a ſtore ſhip - - - ib.
When they continue in a new ſhip, on goods bought with the proceeds of goods ſaved - 169
In what caſe they continue on goods taken on board in the courſe of the voyage - - 142
They continue on goods during an unavoidable delay - - - 257
If goods be inſured from the loading thereof, the policy attaches upon the loading - 260, 323
How long they continue in the lighters of the inſured - - - - - 251
How long in common lighters - - 253
If the owner of the goods take charge of them, the lighterman is diſcharged - - 256
Where the goods remain on board longer than uſual - - - - 257
Where they are ſold without unloading - - ib.
Where the general rule is controlled by particular uſage - - - 258

RISKS—*continued.* Page.

Duration of.

Upon goods.

Every underwriter is presumed to know the usage of the trade he insures - - - 259

The usage of one trade may be proved to shew the practice in another similar trade - - ib.

2. *Upon the ship* - - - 260

When it begins - - - - ib.

In *France* - - - - 261

In *England* - - - - ib.

When it is for a limited term - - ib.

Where the insurance is "*from*" a place - ib.

Where "*at and from*" a place - - ib.

Where it is "at and from" an island, like *Jamaica* or *Guadaloupe* - - - 358

Objections to the time of ending the risk on ships in *English* policies - - - 262

Whether the insurers be liable for any loss after the 24 hours, or the end of the term - 262, 3

Where the cause of the loss existed before - ib.

During quarantine - - - 264

During an embargo - - - 265

At what time the risk ends where a ship is insured from A. to B. generally - - ib.

Where a ship is insured to *Jamaica* generally ib.

Where a ship discharges part of her cargo, and is chartered for another voyage, in which she is to deliver the rest - - - 266

When the insurance is to the *West Indies* generally - - - - 267

On the tackle and rigging, landed during a repair - - - - 269

During an *East India* voyage - - 271

With liberty to "*touch, stay, and trade in any ports or places*" - - - - 272

What is meant by "*any ports and places*" - ib.

Where the liberty is "*to touch and stay*" only 273, 4

The general words will not extend the risk beyond its description - - - - 274

A liberty to touch and stay "*at any ports and places*" means only places in the usual course of the voyage - - - 275

This liberty must be strictly adhered to - ib.

The

RISK—*continued.* Page.

Duration of.

Upon the ſhip.

The riſk may be properly commenced, though under unforeſeen circumſtances - - 275

Whether ſailing from A. for B. which is an integral part of a voyage from A. to D. be a commencement of the riſk from A to D. - 276

Whether the riſk continues though the ſhip do not touch at the places in their proper order 277

Where a ſhip has liberty to cruiſe for a certain number of weeks - - - 197

3. *Upon freight* - - 278

When it commences - - - ib.

If part of the goods be ſhipped - - ib.

If the ſhip be loſt in her way to the port of loading - - - 279

When a policy on freight of a homeward voyage attaches - - - 279

A policy on freight from A. B. and C. to D. will not protect the freight from A. to B. 280, 323

Whether the riſk may be changed - 281

Effect of changing the riſk - - - ib.

In what caſe the taking of letters of marque on board will diſcharge the underwriters - ib. 283

ROBBERY.

When the owners and maſter are liable for, Vide *Riſk* (*Owners liable*).

ROMANS.

Whether acquainted with the contract of inſurance 5

To what extent they carried navigation - - ib.

ROYAL EXCHANGE ASSURANCE.

Vide *Inſurance Companies.*

RUNNING FOUL.

Vide *Loſs* (*By colliſion*).

SAILING INSTRUCTIONS.

Vide *Warranty* (*Convoy*).

SAILORS.

Duty of in caſe of misfortune - - 616

Wages of, when a charge on the inſurer - 538, 721

When

SAILORS.—*continued.* Page.
When entitled to receive their wages - - 89
Cannot insure their wages - - - 90
But they may insure goods purchased therewith - 91
They may borrow money on respondentia, on their goods on board, but not on their wages - 747

SALVAGE.
Vide *Loss* (*By salvage*).

SCOTT, SIR WILLIAM.
Character of his decisions - 30

SEA LETTER.
Vide *Documents*.

SEARCH.
Vide *Warranty* (*Neutral*).

SEA RISK.
Vide *Loss* (*By perils of the sea*).

SEA-WORTHINESS.
Vide *Ship* (*Sea-worthiness of*).

SENTENCE (foreign).
Effect of, Vide *Warranty* (*Neutral*)—*Ship* (*Conduct of*).

SHIP.
Who shall be deemed owners of - - 115
What shall be deemed part of - - 727
Vide *Register*.

Sea-worthiness of - - 153
Implied warranty of - - - ib.
Different degrees of - - 154, 476
At what time she must be sea-worthy - - ib.
What credit is due to a previous survey - 155
A ship insured "at and from" need not be sea-worthy when the policy attaches - - 201
Whether a ship shall presumed to have been sea-worthy, till the contrary be proved - 156
When the proof of unseaworthiness lies on the insurer - - - - 159
A witness who never saw the ship, may prove that from the statement of another witness, she was not sea-worthy - - - - 832

Nothing

SHIP—*continued.* Page.

Sea-worthineſs of.

Nothing will excuſe the breach of this implied warranty - - - - 159
Not the ignorance of the inſured - - 160
Nor the inſurer's knowledge of the ſtate of the ſhip - - - - 161
In what caſe the inſurer ſhall be liable for damage occaſioned by the inſufficiency of the ſhip - 165
In what the owners - - - - ib.
In general it is ſufficient if the ſhip be ſea-worthy at her departure - - - ib.
If a defect appear ſoon after her ſailing, the inference is that ſhe was not ſea-worthy - ib.
To be ſea-worthy ſhe muſt be properly manned ib.
She is not ſea-worthy without a pilot, where neceſſary - - - ib.
If ſhe be not ſea-worthy during any part of her voyage, nothing ſubſequent will better her condition - - - - 410
There need be no repreſentation reſpecting the ſtate of the ſhip before ſailing - - 475, 833

Changing the ſhip - - - 166
When this may be - - - ib.
No clauſe neceſſary to warrant a change of ſhip, in caſe of neceſſity - - - 167
If a man inſure upon any ſhip he ſhall come in from A. to B. he cannot, by removing, change the ſhip - - - - 168
If the ſhip be changed by neceſſity, the riſk will continue on new goods bought with the proceeds of thoſe ſaved - - - 169
When the beſt is done for the intereſt of all parties, the inſurers will be liable - - - 170
In what caſe the captain ought to hire another veſſel - - - - 171
To what expences the inſurers are liable in ſuch caſe - - - - - ib.

Inſurance of goods in "ſhip or ſhips" - 172
When this may be - - - ib.
If there be two policies on goods on board "*ſhip or ſhips*," and a ſhip with part of the goods be loſt, the inſurers on both ſhall contribute ib

If

SHIP—*continued.* Page.

Inſurance of goods in "ſhip or ſhips".

If goods be inſured in a certain ſhip, and others in "*ſhip or ſhips*," and the latter be loſt, the underwriters on the latter policy alone ſhall anſwer - 174

If goods of larger value than the ſum inſured in *ſhip or ſhips*, be put on board ſeveral ſhips, and ſome are loſt, how the loſs ſhall be borne - 176

If goods inſured in ſeveral ſhips, by ſeveral policies, be all ſent in one veſſel to the ſeveral ſhips, and this be loſt, how the loſs ſhall be borne - 176

Employment and conduct of - - 177

This muſt be according to law - - ib.

In what caſe a legal diſqualification will avoid the policy - - - - ib.

Whether the contract will be avoided by the ſhip's acting in contravention of a treaty - 178

As to the offence of deſtroying any ſhip, Vide *Loſs (By Barratry)*—*Loſs (Fraudulent)*.

As to the riſk upon the ſhip, Vide *Riſk (Upon the ſhip)*.

As to foreign built ſhips, Vide *Warranty (Neutral)*.

How valued upon a loſs, Vide *Adjuſtment of Loſſes*.

SHIPPING AND LANDING GOODS.

Who ſhall make good loſſes happening in, Vide *Riſk (Owners liable)*.

In private or public lighters, Vide *Riſk (Duration of)*.

SHIP'S HUSBAND.

Vide *Agent*.

"SHIP OR SHIPS" (inſurance in) - - 172

Vide *Ship*.

SHIPWRECK.

Vide *Loſs (By perils of the ſea) Abandonment*.

SIEGE.

Vide *Blockade*.

SLAVES.

Formerly inſured as goods - - 93

How the trade in them was regulated - - ib.

This

SLAVES—*continued.* Page.
This trade is now totally abolished - - 93
Whether slaves thrown overboard in a storm, or in a scarcity, be a loss within the policy - - 690
Vide *Risk*,—*Subject matter* (*Slaves*).

SMUGGLED GOODS.
As to the insurance of, Vide *Subject matter* (*Smuggled goods*).
Whether money, jewels, &c. intended to be clandestinely transported, may be insured - - 319
If the master be guilty of smuggling it is barratry 263
But if the ship be not seized for such smuggling till after the risk ended, the insurers will not be liable ib.
Vide *Risk* (*Duration of*).
A seizure by an enemy for smuggling is not a capture - - - - - 689

STAMP.
Vide *Policy* (*Stamp*),—*Fire* (*Insurance against*).

STATUTES CITED.
An. Reg. *Edward I.*
3.——c. 4. p. 548 n.
4.——c. 2. p. 548 n.
Edward III.
11.——c. 2. p. 12.
25.——c. 2. p. 556.
27.——c. 13. p. 548 n.
Richard III.
1.——c. 9. p. 13.
Henry VIII.
28.——c. 15. p. 556.
Elizabeth.
43.——c. 12. p. 3, 11, 25, 26, 699 n
James I.
21.——c. 3. p. 13.
Charles II.
12.——c. 18. p. 63, 64, 557, 647.
13 & 14. c. 23. p. 26.
16.——c. 6. p. 742.
22 & 23. c. 11. p. 742.

STATUTES CITED—*continued.* Page.

An. Reg. *William and Mary.*

4 & 5. c. 15. p. 57.
7 & 8. c. 22. p. 63, 64.

William III.

8 & 9. c. 36. p. 57.
9 & 10. c. 44. p. 65, 66, 67.
——— c. 52. p. 182.
11 & 12. c. 7. p. 556.

Anne.

1 ſtat. 2. c. 9 p. 557.
5. ——— c. 8. p. 63 n.
9. ——— c. 6. p. 2.
12. ——— c. 16. p. 649.
12 ſtat. 2. c. 18. p. 548.

George I.

4. ——— c. 11. p. 557.
——— c. 12. p. 558.
6. ——— c. 13. p. 697.
6. ——— c. 18. p. 28, 45, 48, 695, 697.
7. ——— c. 21. p. 744, 745.
7. ——— c. 27. p. 47.
8. ——— c. 24. p. 90, 557.
--- c. 30. p. 697.
11. ——— c. 29. p. 558.
——— c. 30. p. 698.

George II.

7. ——— c. 5. p. 794.
——— c. 21. p. 744, 745.
12. ——— c. 30. p. 63 n.
13. ——— c. 4. p. 551 n.
15. ——— c. 33. p. 63 n.
19. ——— c. 32. p. 144 n.
19. ——— c. 37. p. 60, 97, 103, 111, 116, 118, 122, 126, 133, 136, 143, 146, 152, 288, 587, 640, 710, 743, 761, 764.
22. ——— c. 33. p. 317, 318, 361.
26. ——— c. 19. p. 548.
29. ——— c. 34. p. 568 n. 569.

George III.

14. ——— c. 48. p. 129, 306, 774, 787.
16. ——— c. 5. p. 83.
19 ——— c. 67. p. 108 n.

STATUTES CITED—*continued.* Page.

An. Reg. *George III.*

22.——c. 25. p. 504, 570.
24.——c. 47. p. 263.
25.——c. 44. p. 306.
26.——c. 60. p. 116, 384, 712.
——c. 86. p. 245.
27.——c. 1. p. 2.
——c. 19. p. 384.
28.——c. 38. p. 58.
——c. 56. p. 307, 309, 311.
29.——c. 68. p. 88.
31.——c. 54. p. 178 n.
33.——c. 27. p. 32, 38, 88.
——c. 52. p. 66, 67.
——c. 66. p. 283, 381, 505, 593 n.
34——c. 9. p. 88.
——c. 68. p. 384.
35.——c. 8. p. 684.
——c. 63. p. 261, 322, 337, 341.
——c. 80. p. 109.
37.——c. 97. p. 68, 75, 182.
38.——c. 76. p. 379, 383, 474.
39 & 40. c. 67. p. 63 n.
41.——c. 10. p. 338.
42.——c. 99. p. 340.
43.——c. 160. p. 505, 551, 568 n.
44.——c. 98. p. 341, 786.
47.——c. 36. p. 93, 94, 554 n.

STOWAGE.

Vide *Risk (Owners and master liable)*.

STRANDING.

What shall be - - 234, 239, 240, 689
Vide *Risks (Excluded by memorandum)*—*Loss (By perils of the sea)*.

SUBJECT MATTER (of marine insurance).

Smuggled goods - - - 55
Insurance upon is void - - - ib.
What is meant by - - - - 56
The insurer may take the objection though he knew the trade to be illegal - - - ib.

SUBJECT MATTER—*continued.* Page.

Smuggled goods.

Doctrine of foreign writers on this point - 56
Inſuring the delivery of, reſtrained - - 57
How the inſurance of the delivery of *wool* in foreign parts is reſtrained - - - - - 58
Whether a trade prohibited by the laws of one country may be legally inſured in another - 58
The laws of *England* pay no regard to the revenue laws of other countries - - - - 60
Whether a policy on a ſmuggling adventure in a foreign country, contrary to a *Britiſh* treaty, be legal - - - - - - ib.
Vide *Smuggled goods*.

Prohibited colonial commerce - - 62
No inſurance can be legally made on any commerce carried on contrary to the laws of the dependencies of this kingdom - - - 62
How the colonial trade is regulated by the navigation laws - - - - ib.
Goods cannot be inſured from the *Britiſh Weſt Indies* to *Gibraltar* - - - - 64
Nor on board a *Swediſh* ſhip from *Madras* to *Gottenburgh* - - - - ib.
No legal inſurance can be made on a voyage to the *Eaſt Indies* in contravention of the 9 & 10 *W. III.* c. 44, though the penalties of that act are repealed - - - - 65
How a licence from the *Eaſt India Company* ſhall be conſtrued, where the whole of the voyage becomes impracticable - - - 837
Though the *Americans* may trade to the *Britiſh* ſettlements in *India*, they muſt not carry on the coaſting trade - - - - 68
If a foreign ſhip, trading to the *Britiſh* colonies under a treaty, violate the treaty, this will avoid a policy on her - - - - 74
But a policy on a legal cargo is not vitiated by a previous offence of this ſort - - ib.

Contraband of war - - - - 78
What articles are ſuch - - - ib.
Inſurance of, illegal - - - 81
If ſent to the enemy - - - ib.

SUBJECT MATTER—*continued.* Page.

Contraband of war.

If exported in contravention of an embargo - 82
If ſent to a *Britiſh* colony with which all intercourſe is prohibited - - - - 83
Or while it is in the hands of the enemy - 84

Commerce with the enemy - - - - 85
All trade with the enemy without a licence is illegal ib.
Such licence muſt be ſtrictly obſerved - - 87
Goods bought of the enemy cannot be inſured 86, 87
But this objection muſt be taken in the firſt inſtance - - - - 36, 89
Goods ſent to a *Britiſh* ſettlement, while in the hands of the enemy cannot be inſured - - 84
But oil, the property of a neutral, may be inſured from a neutral port to an enemy's port - 836
The mere carrying of enemy's goods on board is no breach of neutrality - - - ib.
If a ſhip in ſuch caſe be ſeized by a *Britiſh* ſhip of war the inſured may abandon - - ib.
Vide *Enemy.*

Wages and effects of mariners - - 89
Mariners are to receive but a moiety of their wages abroad - - - ib.
They cannot inſure their wages - - 90
But they may inſure goods purchaſed therewith - 91
The captain may inſure his goods on board, or his ſhare in the ſhip - - - ib.
Or he may inſure his commiſſions and privileges in the *African* ſlave trade - - 831
Vide *Sailors.*

Freight - - - - 91
In *France* freight not already earned cannot be inſured - - - ib.
In *England* freight *expected*, as well as the ſhip, may be inſured - - - - 92
What ſhall amount to a loſs upon freight - ib.
Vide *Freight.*

SUBJECT MATTER—*continued.* Page.

Slaves - - - - - 92
Were formerly insured as goods - - 93
How this trade was regulated - - ib.
Now totally abolished in this kingdom - - ib.

Profit - - - - 94
How insurable abroad - - - ib.
Reasons against the insurance of it - - ib.
Yet it has been holden to be legal - - 97
If imaginary profit of a cargo of goods be insured, the loss of the ship is a total loss, though the cargo be carried to the port of delivery in another ship - - - 101
But the insured must shew that he would have made a profit had not the loss happened - - 102

TACKLE.
How protected by the policy - - - 264
Vide *Risk* (*Duration of—On ship*).

TENDER.
Vide *Proceedings* (*Plea*).

THEFT.
When the owners and master shall be liable for - 242
Vide *Risk* (*Owners liable*).

TIME (Insurance for).
Not to be for longer than twelve months - - 338
Vide *Policy* (*Stamp*).
When the risks on a policy for time shall end 261, 584
Vide *Risk* (*Duration of*).

TOTAL LOSS.
Vide *Loss,—Abandonment.*

TRADE AND TRADING.
Vide *Commerce.*

TREATY.
Whether a trade carried on in contravention of a *British* treaty may be insured - 60, 178

TRIAL.
Vide *Proceedings* (*Trial*).

TRUSTEE. Page.
When he ſhall have an inſurable intereſt - - 108
Vide *Intereſt* (*Inſurable*).

UNDERWRITERS.
Vide *Parties to the Contract* (*Inſurers*).
Character of the *French* underwriters - - 45
Engliſh underwriters - - ib.
An agent or broker ought not to underwrite 301, 704
If he do, he may from neceſſity be a witneſs for the other underwriters - - - 704

USAGE OF TRADE.
What ſhall be deemed - - - 186
A few inſtances will not make an uſage - - ib.
Effect of uſage upon the contract of inſurance - 226
Every underwriter is preſumed to know the practice of the trade in which he inſures - - 259
And he is bound by ſuch uſage - - 270
Deſcribing the voyage is a reference to all the circumſtances of it - - - - ib.
The warranty to ſail with convoy is controlled by uſage - - - - - 375
The uſage of one trade may be given in evidence to prove the practice of another ſimilar trade - 259
Whether a practice prevailing for three years amounts to an uſage of trade - - - ib.
Upon what principle the authority of uſage reſts - 707
How far it ought prevail - - - ib.
An uſage not inconſiſtent with the terms of the policy may be received in evidence - - 365
In what degree the terms of the policy are controlled by uſage - - - 661, 727
Vide *Evidence*.

"USURPED POWER."
How theſe words are underſtood in a fire policy - - 790

VALUATION.
How fixed in a valued policy - - 621
Vide *Adjuſtment* (*As to value*).

VALUED POLICY.
Vide *Policy* (*Different ſorts*).

VENUE. Page.
When it may be charged in an action on a policy - 694
Vide *Proceedings* (*Declaration*).

VISITATION AND SEARCH OF NEUTRALS.
The right of vindicated - - 81, 436
Vide *Subject Matter* (*Contraband of war*),—*Warranty* (*Neutral—Forfeiture*).

VOYAGE.
What - - - - 180
When the illegality of it avoids the contract - ib.
No legal insurance can be made on an illegal voyage 181
As being contrary to th laws of this kingdom or any of its dependencies - - ib.
Or the law of nations - - - - ib.
Or the laws for protecting the monopoly of the *East India Company* - - - ib.
Though the penalties of the 9 & 10 W. III. c. 44. repealed - - - 182
But a voyage will not be illegal because the *whole* of the voyage licensed by the *India Company* becomes impracticable - - - 837
What shall be a legal voyage between *America* and the *British* settlements in *India* - - 182
If an entire voyage be illegal in its commencement, an insurance on any part of it is void - - 72
How the voyage shall be described in the policy 321
The description of the voyage is a reference to all the circumstances attending it - - 270
When the loss of the voyage shall be a total loss, Vide *Abandonment*.
Deviation from - - - 183
Deviation defined - - - ib.
Effect of - - - - ib.
Distinction between an intended deviation and a different voyage - - 184, 326, 327
Why it discharges the underwriters - - 184
It determines the contract, though the ship resume her proper course - - - 185
1. *What shall be* - - - ib.
What is meant by the usual course of the voyage ib.

Stopping

VOYAGE—*continued.* Page.

Deviation from.

What ſhall be.

Stopping at certain places is no deviation, *if according to uſage* - - - 185
But a few inſtances will not make an uſage - 186
The ſmallneſs of a deviation makes it not the leſs fatal - - - - ib.
It is fatal, though neither the riſk or the premium would be greater if it were permitted - 187
A liberty to "*touch and ſtay*" will not warrant a *breaking bulk* or *trading* at a place 188, 275
Yet a ſhip, with liberty to *touch* only, may trade, provided this occaſion no delay, deviation or additional riſk - - - 835
Nor will a liberty to *diſcharge* goods warrant a taking of others - - - 188, 275
If there be ſeveral ports of diſcharge, the ſhip muſt viſit them in their order - - - 189
Unleſs there be an uſage to the contrary - ib.
She may go to any one place - - 190
But if to more than one, ſhe muſt take them in their order - - 190, 325
If the ports of diſcharge be not particularly ſpecified, ſhe muſt take them in geographical order - - - 190
But neceſſity will juſtify a variation in the order of the places - - - 191
A liberty to touch "*at any ports or places*" means ports or places in the uſual courſe of the voyage - - - - ib
Such a liberty is ſubordinate to the voyage inſured - - - - ib
It gives no power to *change* the voyage - 192
In what caſe a cruiſing in queſt of prize ſhall not be a deviation - - - 195
Whether a letter of marque may chaſe an enemy 196
How a liberty to cruiſe for ſix weeks ſhall be conſtrued - - - - 197
A liberty to take letters of marque is conſtrued ſtrictly - - - 198
A liberty to chaſe, capture, and man prizes, will not juſtify convoying a prize - - 199

When

VOYAGE—*continued.* Page.
Deviation from.
What ſhall be.
When an unuſual duration of the voyage amounts to a deviation - - - 199
Time ſpent in repairs is not an unneceſſary delay 200
An *intended* deviation will not diſcharge the underwriters - - - 201
When a previous deſign to touch ſhall be only an intended deviation - - - 324
Diſtinction between a different voyage, and an intended deviation - - 324-5
What ſhall be the conſequence of ſailing on a voyage different from that deſcribed in the policy 326
Whatever may be the intention of the inſured, if the ſhip ſail on a different voyage from that deſcribed, the underwriters are diſcharged - ib.
If freight be inſured from *A.* to *B.* but the goods are intended to be ſent to *C.* the policy is void ib.
If there be ſeveral tracks to the place of deſtination, the maſter ſhould be at liberty to chuſe 203
2. *When juſtified by neceſſity* - - - ib.
If the captain aim to perform the voyage in the ſhorteſt and ſafeſt manner, a departure from the direct courſe is no deviation - - ib.
The extent of the deviation muſt be juſtified by the degree of neceſſity - - 204
A deviation is juſtified by neceſſity, though the cauſe of the neceſſity be not amongſt the perils inſured againſt - - - ib.
1. *By ſtreſs of weather* - - - ib.
2. *Want of neceſſary repair* - - - 207
Putting into port to lighten, if too heavily laden, or to take in ballaſt, if too light, is no deviation 208
But a ſhip muſt not trade when ſhe puts into a port for repairs - - - 209
Yet a ſhip having liberty to *touch*, may trade, if it occaſion no delay or additional riſk - 835
3 *To join convoy* - - 210, 354, 355
4. *Succouring ſhips in diſtreſs* - - - 211
5 *To avoid capture or detention* - - - ib.
6. *Sickneſs of the maſter or mariners* - - - 212
7. *Mutiny of the crew* - - - - ib.
When a deviation ſhall amount to barratry, Vide *Loſs* (*By barratry*).

WAGES (of mariners). Page.
When and how payable - - - 89
Incurred during a repair, when a general average 538, 721, 726
Whether insurable - - - 90, 91
Whether money may be lent on respondentia on wages - - - - 747
Vide *Sailors—Subject Matter (Wages)*.

WARLIKE STORES.
Vide *Subject Matter (Contraband of War)*.

WARRANTY.
Nature of - - - 346
Different sorts - - - - ib.
How construed - - - 347
How performed - - - ib.
Effect of the breach of - - - - 348
How made - - - - 349
It must appear on the face of the policy - ib.
A paper wrapped in, or wafered to, a policy, will not make a warranty - - - 350
But it may be written in the margin - - - ib.
In what case the contents of a separate paper will make part of the contract - - - ib.
That the ship was safe on a given day - ib.
It is sufficient if she was safe on any part of the day ib.
To sail by a given day - - - 351
Nothing will excuse a non-compliance - - ib.
Not even an embargo - - - 352
Or an irresistible force - - - ib.
And a warranty to sail after the day must be performed with equal strictness - - ib.
What shall be a compliance with this warranty - 353
If she sail before the day, but not in the direct course, this will be a different voyage, unless it be to join convoy - - - - - 353
If an embargo be proclaimed, and the ship put herself into it, this will excuse a non-compliance 358
Breaking ground with intent to sail, though immediately obliged to put back, is a compliance 359
What shall be a departure from the port of *London* ib.

WARRANTY—*continued.* Page.
To ſail with convoy - - - ib.
This muſt be ſtrictly performed - - 359
Effect of non-compliance - - ib.
Whether ſhe may ſail without convoy, if ſhe be diſabled in her way to the place of rendezvous 360
1. *It muſt be with the regular convoy* - -, ib.
Convoy what - - - ib.
How the officers, &c. of the convoying ſhip ſhall be puniſhed for miſbehaviour - ib.
What ſort of convoy is meant by the warranty 361
The mere protection of a ſhip of war is not convoy - - - 362
2. *And from the place of rendeſvous appointed by government* - - - - ib.
When the ſhip ſhall be protected by the policy to the place of rendezvous - - 363
3. *And with convoy for the voyage* - - 364
What is meant by convoy for the voyage 364,5
Whether different convoys, for different parts of the voyage, be convoy for the voyage 367, 8, 9
4. *The ſhip muſt have ſailing inſtructions* - 368
How far theſe are eſſential to ſailing with convoy - - - ib.
If the ſhip arrive at the place of rendezvous before the appointed time, and find the convoy gone, this will not excuſe the want of them - - - 369
In what caſe the want of them will be excuſed 371, 2
If the maſter of the ſhip loſe any opportunity of getting them, it is fatal - - 373
The warranty muſt be expounded according to the uſage of trade - - - 375
5. *The ſhip muſt depart, and continue, with the convoy* 376
She muſt get under weigh with the convoy ib.
And not leave it without neceſſity - ib.
If ſeparated, ſhe muſt rejoin the convoy as ſoon as poſſible - - - 378
If ſhe get under weigh in time, but wait for the captain till ſhe loſe her place in the convoy, it is fatal - - - - 776

But

WARRANTY—*continued.* Page.

To ſail with convoy.

The ſhip muſt depart and continue with the convoy.

But ſhe is not obliged to keep with the convoy at all events - - - 378

If the maſter, through fraud or negligence, deſert the convoy, this will diſcharge the underwriters - - - - ib.

By ſtatute no ſhip ſhall ſail without convoy 379

Penalties for ſailing without, or deſerting, convoy ib.

In ſuch caſe the inſurance ſhall be void - 380

And bond muſt be given to ſail with, and not deſert, convoy - - - ib.

Exceptions - - - - - 381

When a ſhip ſhall be within the exception 382

Duty of the captain with reſpect to ſignals 381

Of neutrality - - - 384

Meaning of this warranty - - - 411

Deſcribing a ſhip as belonging to a neutral ſtate is equivalent to a warranty - - 430

But if there be only a verbal repreſentation it will not affect the contract - - - 442

Nature of it - - - - 385

How expreſſed in the policy - - - 442

What ſhall be deemed neutral property - - ib.

When a neutral ſubject loſes the protection of the neutral flag - - - - ib.

It is ſufficient if it be true when made - - 387

The chance of future war is a riſk within the policy - - - - 388

1. *When falſified by condemnation as prize* - ib.

What ſhall be a court of competent juriſdiction in queſtions of prize - - ib.

When the judgment of a foreign court ſhall be concluſive - - - ib.

The ſentence of a belligerent conſul reſident in a neutral country, has no authority 389

Otherwiſe if the neutral ſtate acquieſce 390, 712

Or if the ſentence be pronounced in the court of a co-belligerent - - - 390

By comity, foreign ſentences are concluſive in our courts - - - 391

WARRANTY—*continued.* Page.

Of neutrality.

Falsified by condemnation as prize - 391
But this comity is not universal - ib.
It is not regarded in *France* - ib.
When first adopted in *England* - 392
Consequences of it - 393
Stipulations that certain proofs of neutrality shall be conclusive - ib.
When our courts may examine the sentence notwithstanding a foreign judgment - 394
If it be ambiguous it will not be conclusive - ib.
Neutrals are not bound to take notice of regulations made by belligerents contrary to the law of nations - 397
Whether, being informed of them, they ought to take notice of them for their own safety 399
If an insurer know of them, he should give notice to the insured - 400
If both be ignorant, the non-observance of them will not affect the contract - ib.
The ship must be navigated according to subsisting treaties - 397, 408
A sentence as good prize is conclusive without stating any ground - 401
If it do not necessarily falsify the warranty its truth may be proved - 402
A condemnation as enemy's property is conclusive, though manifestly unjust - 403
But it is conclusive only as to the points which it professes to decide - 411
The meaning of the warranty is that the ship shall be neutral to the purposes of being protected - 406, 411
As to the documents which ships are required to have, Vide *Documents*.
The want of any of these is only presumptive evidence against neutrality - 408
If the ship be not properly qualified to sail as a neutral any part of the voyage, the underwriters will be discharged - 409

WARRANTY—*continued.* Page.

Of neutrality.

Falsified by condemnation as prize.

As if, for the temporary want of a document, she be subject to detention - - 410

A condemnation because the captain was an enemy, contrary to a *French* ordnance, does not falsify the warranty - - 414

Our courts are bound to give credit to foreign sentences, though founded on a system of plunder - - - - ib.

Ships ought to be furnished with the documents which, by treaty, are agreed to be evidences of their neutrality - - 416

A condemnation for want of a document not required by the law of nations, or by treaty, is not conclusive - - - 420

If upon the whole of the sentence it can be collected that it proceeded on the ground of enemy's property, it is conclusive - 422

The party objecting to a sentence is bound to shew that it did not proceed on the ground of enemy's property - - - 425

Of what force are foreign ordinances in our courts, - - - - 426

The want of any requisite to prove neutrality is conclusive - - - 428

By express stipulation in the policy, the insured may avoid the effect of a foreign sentence - - - - 430

If the sentence have one legal ground, it will be conclusive, though joined to several bad ones - - - - 433

A sentence of prize will be conclusive, though it collect the indicia from which that conclusion is drawn from ordinances not binding in other states - - - 434

What shall amount to a forfeiture of neutrality 435

Resisting visitation and search - - 436

Whether a neutral be bound to submit to visitation and search considered - - - 439

Law of nations defined - - - ib.

Doctrine of *Hubner* - - - ib.

WARRANTY—*continued.* Page.

Of neutrality.

What ſhall amount to a forfeiture of neutrality.

Doctrine of the *Conſolato del Mare* - - 440
Of *Bynkerſhoek* - - - - ib.
Of *Vattel* - - - - 441
French ordinances - - - ib.
Attempts of the *Northern Confederacy* - 442
Judgements of our Courts of Admiralty - 444
Belligerent cruiſers have a right to ſearch all neutrals 445
No neutral ſovereign can deprive them of this right 446
The penalties of reſiſtance - - - 447
But the neutral muſt have had notice of the war 449

WEAR AND TEAR.

Is no loſs within the policy - - 492
Vide *Loſs* (*By perils of the ſea*).

WET (damage by).

When the owners and maſter ſhall be liable for - 242
Vide *Riſk* (*Owners and maſter liable*).

WISBUY (laws of).

Vide *Marine Law.*

WITNESS.

Vide *Evidence.*

WOOL. (exportation of).

Vide *Subject Matter* (*Smuggled goods*).

WOOLLEN MANUFACTURE.

When introduced into *England* - 12

WORMS.

If a ſhip be deſtroyed by, it is not a loſs by perils of the ſea - - - - - - 492
Vide *Loſs* (*By perils of the ſea*).

WRIT OF ERROR.

Suing out, is a breach of the conſolidation rule, though for manifeſt error - 702

FINIS.

Printed by A Strahan, Law Printer to His Majeſty,
Printers Street, London.

ground is good without the words *vi et* 705

e facias on a recognizance for the peace, *a pacem* are sufficient without *vi et armis.* 483. s. 19

VICTUALS AND VICTUALLER.

hant strangers may sell imported victuals the gross. 645

8 Edw. 3. c. 6. all dealers in any kind of tuals shall sell for reasonable profits, and chief officers of the town shall see they do n pain of treble value of the thing exor- tly sold. 646

butchers selling unwholesome meat shall punished, margin. *ib.*

s amie may dispose of their victuals. 646

Hen. 8. c. 2. the lord chancellor, &c. set the prices upon victuals *ib.*

all not restrain officers of cities, &c hav- authority to set the prices of victuals. *ib.*

3 Edw. 6. c. 15. if any butchers, brew- bakers, poulterers, cooks, costers, or fruit- shall *conspire* to raise the price of vic- , &c. they shall forfeit, &c. 647

Geo. 3. c. 11. no brewer, innkeeper, vic- ler, shall be sued for advancing the price strong beer and ale in a reasonable degree. *ib.*

VILLAINOUS JUDGMENT.

a punishment inflicted by the common law. 449, s. 9

was formerly inflicted for conspiracy. *ib.*

is now obsolete; no instance of it since Edw *ib.* (N. 5)

UNITARIANS.

rian dissenters saved from penalties of de- ying the Trinity by 53 Geo. 3. c. 160. 411

USURY.

shall be deemed usury. 613

How usury is restrained by common law. 613

far persons in general are restrained by the tute 12 Ann. c. 16. from the offence of ury. 614

hat cases the usurious contract is void. 614 to 624

In what cases the usurer is liable to the penal- s of the statute 12 Anne, c. 16. 620

What way the offender may be proceeded against. *ib.*

hat is required in the pleadings in an action, information for usury. 621

What rate of brokerage is allowed for the raising money. 623

WAIFS.

Take *waifs* or *stray*, before they have been *seized*, &c. is not felony by the common law. 149

WAIVER.

If the king seize a recusant's lands, it is a *waiver* of his power to seize the goods. 375

WALES.

By 26 Hen. 8. c. 6. a murder in *Wales* may, on *indictment*, be tried in the adjoining *English* county. 93

WARRANT.

Killing an officer whose warrant gives him no authority to make *the arrest*, is only man- slaughter. 193

So also where a good warrant is executed in an unlawful manner. 104

In what cases homicide by an officer endeavour- ing to execute a warrant is justifiable. 81, 82

How a warrant for surety of the peace is to be executed. 481

In what cases a warrant is necessary to arrest an *affrayer*. 491

WATCH.

The inhabitants are not bound to keep watch in a new way, or make amends for a robbery therein, or to repair it, unless license be first obtained upon *ad quod damnum*. 698

WEAVER.

A weaver who has *received* silk to work may be guilty of larceny by taking part of it feloniously away. 143

WIFE.

The principle upon which she is excused for fe- lonies committed in her husband's company. 4. (N. 7)

WITCHCRAFT.

Conjurers, witches, and sorcerers, distinguished and described. 356

They were anciently punished as *heretics*, by the writ *de hæretico comburendo, &c.* *ib.*

In the reign of Edw. 3, a *sorcerer* was permitted to excuse himself by swearing that he would no longer be a sorcerer. *ib.*

The offenders divided into four kinds by 1 Jac. 1. c. 12. 356

The punishment inflicted by that act. 357

By 9 Geo. 2. c. 5. no proceedings shall be had against any person for witchcraft, sorcery, en- chantment, or conjuration, &c. *ib.*

Whoever shall pretend to exercise these arts, or to discover stolen goods, shall be imprisoned for one year, stand four times in the pillory, and find sureties. *ib.*

WITNESS.

In conspiracy, it is no excuse for a defendant to say that he was only examined as a witness on the trial. 447

WOOD.

Constables may search the houses of suspected wood-stealers. 166

WOOL.

See EXPORTATION.

The offence of exporting wool. 551

WORDS.

The *great question* examined, whether words only

only spoken can amount to an overt act of compassing the king's death. 13, 14 (N. 6)
How far reproachful words to a judge may amount to a high misprision. 64
How far words against the king amount to a contempt of his person and government. 66
No affront, by bare words, &c. however false, malicious, or aggravated, can amount to such a provocation as will alleviate homicide from murder to manslaughter. 98
No one ought to be bound to good behaviour for any rash, quarrelsome, or unmannerly words, unless they tend to break the peace, or to calumniate the state, &c. 486
But a recognizance of the peace may be forfeited, even by words *directly* tending to a breach of th peace. 483
No quarrelsome or threatening words shall amount to an affray, &c. 487
How far words shall be said to inspire such degree of terror as is necessary in forcible try.
Threatening speeches, *in terrorem populi*, amount to a riot.
How words must be expressed and understo to make a writing libellous.

WOUND.

In what cases the wounding another may be tified or excused. 483, 484. 490.

WRITINGS.

Writings cannot, by the common law, be subject *of larceny*. 14
But by 2 Geo. 2 c. 25 to steal the writing therein enumerated is felony of like nature stealing the property they are calculated to cure, &c. 19

END OF VOL. I

London: Printed by W. Roworth, Bell-yard, Temple bar.